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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 243

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

F. W. FITCH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1939

CERTIORARI GRANTED OCTOBER 9, 1939

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 11,306
TAX REVIEW.

F. W. FITCH, PETITIONER,
VS.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ON PETITION TO REVIEW DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS.

FILED SEPTEMBER 8, 1938.

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a (Order Extending Time to File Record to September 1, 1938.)

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Eighth Circuit, be and it is hereby extended to September 1, 1938.

C. R. ARUNDELL,
Member.

Dated: Wash. D. C.
July 11, 1938.

j
Now, Aug. 29, 1938, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

(Endorsed): Filed in the U. S. Circuit Court of Appeals, Eighth Circuit, on September 8, 1938, E. E. Koch, Clerk.

1 (Docket Entries.)

F. W. Fitch, Petitioner,
Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

Appearances:

For Taxpayer: Arnold F. Schaetzle, Esq.

For Comm'r.: H. D. Thomas, Esq., H. A. Melville, Esq.
Transferred to Mr. Sternhagen 12/14/37.

1936

May 26—Petition received and filed. Taxpayer notified.
(Fee paid.)

May 26—Copy of petition served on General Counsel.

July 16—Answer filed by General Counsel.

July 21—Copy of answer served on taxpayer.

1937

Feb. 27—Hearing set week of 5/3/37, Des Moines, Iowa.

May 5—Hearing had before Mr. Miller, Div. 16, on merits.
Submitted. Stipulation of facts filed. Pet's
brief due 6/20/37; Commissioner's brief due
7/20/37; Pet's reply due 8/5/37.

May 27—Transcript of hearing of 5/5/37 filed.

June 18—Brief filed by taxpayer. 6/19/37 copy served on
General Counsel.

Sept. 8—Motion for leave to file brief, brief lodged, filed by
General Counsel. 9/9/37 Granted.

Oct. 2—Motion for leave to file reply brief, reply brief
lodged, filed by taxpayer. 10/6/37 Granted.

Oct. 8—Copy of motion and reply brief served on Gen-
eral Counsel.

1938

Jan. 12—Memorandum Findings of Fact and Opinion ren-
dered, John W. Sternhagen, Div. 10. Judgment
will be entered under Rule 50.

Feb. 12—Recomputation of deficiency filed by General
Counsel.

Feb. 16—Hearing set March 9, 1938, on settlement under
Rule 50.

Feb. 16—Hearing had before Mr. Van Fossan, on settle-
ment under Rule 50. Not contested. Referred to
Mr. Sternhagen for decision.

Mar. 10—Judgment entered, John M. Sternhagen, Div. 10.

- May 24—Petition for review by United States Circuit Court of Appeals, Eighth Circuit, with assignments of error filed by taxpayer.
- May 24—Proof of service filed.
- July 11—Praecipe for record filed by taxpayer.
- July 11—Motion for extension of time to Sept. 1, 1938 to prepare and transmit the record filed by taxpayer.
- July 11—Order extending time to Sept. 1, 1938 for preparation of evidence and delivery of record entered.
- July 14—Agreement to praecipe filed.
- July 14—Proof of service of praecipe filed.

(Petition of F. W. Fitch for Appeal.)

Filed May 26, 1936, United States Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the notice of deficiency IT:AR:D-2; ELA-90D, dated March 3, 1936, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual, citizen and resident of Des Moines, Iowa, his address being 15th and Walnut Streets, of this City.
2. The notice of deficiency (a copy of which is attached and marked Exhibit A), was mailed to the petitioner on March 3, 1936.
3. The taxes in controversy are income taxes for the calendar year 1933 and are in the sum of \$1,967.26.
4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:
 - (a) The respondent erred by adding to the income of petitioner 60% of the income from the F. W. and Lettie S. Fitch Trust, in the sum of \$7,128.00.

(b) The respondent erred in adding to income of petitioner, income taxes in the sum of \$5,146.10 paid by The F. W. Fitch Company, a corporation, for and on behalf of the petitioner.

(c) The respondent erred by adding to income of the petitioner the sum of \$208.82 representing attorney fees paid by The F. W. Fitch Company for and on behalf of the petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On April 23, 1923, the petitioner, together with his wife, Lettie S. Fitch, conveyed a factory building to the Bankers Trust Company, of Des Moines, Iowa, trustee. On this same date a declaration of trust respecting said property was duly declared and executed. Under the terms of a lease entered into by The F. W. Fitch Company, a corporation, lessee and F. W. Fitch, lessor, on the 1st day of April 1923, which lease was duly assigned to the trustee above named. The F. W. Fitch Company pays an annual rental of \$12,000.00 per year to said trustee for the use of the premises. The lease is for a term of 99 years. Under the terms of said declaration of trust the petitioner receives 40% of the income of said trust and Lettie S. Fitch receives 60%. Said trust is irrevocable. This trust was not made in contemplation

5 of a divorce between the petitioner and the said Lettie S. Fitch and no divorce proceedings of any kind were pending at the time of the execution of the assignment. It is true that about two years after the trust was executed the parties did become involved in divorce litigation in Polk County, Iowa. A decree of divorce was duly entered by the Polk County, Iowa District Court on December 17, 1925, and under its terms a separate property settlement, independent of the Court, was negotiated between the parties. The Court approved the settlement which was made and it likewise approved the trust which had been declared on April 23, 1923. However, the trust at the time of its creation was not an alimony trust and since it was irrevocable and by its terms unchangeable it was not affected by the subsequent divorce decree.

(b) The petitioner is president of The F. W. Fitch Company, an Iowa corporation. During the year under review the corporation paid income taxes in the sum of \$5,146.10 for the petitioner and on its book of account charged the amount to surplus. The item has not been allowed by the respondent as a deduction to the corporation and it there-

fore is not compensation to the petitioner. The item is not a dividend to the petitioner. Payment of this item by the corporation merely created a debt owing by the petitioner to said corporation and as such it is not income to him. The corporation charged the item to surplus in error. It should have been charged to petitioner's account.

(c) As in the case of item b above, The F. W. Fitch Company paid attorney fees in the sum of \$208.82 on behalf of the petitioner. This item has not been allowed, by the respondent, as a deduction to the corporation. It also is a debt owing by the petitioner to the corporation and as such is not income to him. In any event the item represents deductible legal expense to the petitioner and if taken up as income to him it should be allowed as a deduction to him.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the following items should be eliminated from the respondent's computation of taxable net income:

(a) The sum of \$7,128.00 representing 60% of trust income paid to Lettie S. Fitch.

(b) The sum of \$5,146.10 representing income taxes paid by The F. W. Fitch Company for the petitioner.

(c) The sum of \$208.82 representing attorney fees paid by The F. W. Fitch Company for the petitioner.

ARNOLD F. SCHAEZLE

Counsel for Petitioner
402 Hubbell Bldg.,
Des Moines, Ia.

7 State of Iowa,
Polk County—ss.:

F. W. Fitch, being duly sworn, says that he is the petitioner named in the within and foregoing petition, that he has read the same and is familiar with the statements contained therein and the facts stated are true as he verily believes.

F. W. FITCH

Subscribed and sworn to before me this 23 day of May, 1936.

Orig. Duly Verified:

(s) EARL L. DRATH
Notary Public.

My Commission Expires July 4, 1936.
(Notary Seal)

(Exhibit A.)

Treasury Department.

Washington

Office of

Commissioner of Internal Revenue

March 3, 1936.

Mr. F. W. Fitch,
15th & Walnut Streets,
Des Moines, Iowa.

Sir:

You are advised that the determination of your income tax liability for the taxable year 1933 discloses a deficiency of \$1,967.26 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932 as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return (s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, which ever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By W. T. Sherwood,
Acting Deputy Commissioner.

Enclosures:

Statement
Form 870

Statement.

IT:AR:D-2

ELA-90D

In re: Mr. F. W. Fitch,
15th & Walnut Streets,
Des Moines, Iowa.

Income Tax Liability.

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1933	\$3,513.61	\$1,546.35	\$1,967.26

The report of the internal revenue agent in charge at Omaha, Nebraska, a copy of which was mailed to you on January 6, 1936, has been approved with the following adjustment. Income from the F. W. and Lettie S. Fitch Trust has been held to be taxable to you as grantor. An examination of the return filed by the trust indicates that it was an alimony trust. In this connection, you are advised that the Bureau holds that income from a trust created in lieu of alimony is taxable to the husband, the grantor, for the reason that the income of the trust was used for the discharge of the grantor's personal and marital obligations.

This position is based on the following: General Counsel's Memorandum 13308, the decision of the United States Board of Tax Appeals in the case of Frank P. Welch, 12 B. T. A., page 800 and Income Tax Ruling No. 1699, Cumulative Bulletin II-1, page 52.

Net income reported	\$19,045.36
---------------------	-------------

Add:

- | | | |
|---|------------|-----------|
| 1. Amount paid for your income taxes by corporation | \$5,146.10 | |
| 2. Amount paid by the corporation for attorney fees in connection with income taxes | 208.82 | |
| 3. Add 60% income of trust paid to Mrs. Lettie Fitch | 7,128.00 | 12,482.92 |

Total income		\$31,528.28
--------------	--	-------------

Less:

Depreciation allowed	1,368.22
Net income adjusted	\$30,160.06
10 Brought Forward	\$30,160.06
Less:	
Personal exemption	2,500.00
Balance subject to normal tax	27,660.06
Normal tax at 4% on \$4,000.00	160.00
Normal tax at 8% on \$23,660.06	1,892.80
Surtax on \$30,160.06	1,460.81
Total tax	\$3,513.61
Tax assessed, #21176	1,546.35
Deficiency	\$1,967.26

Explanation of Changes.

1. An amount of \$5,146.10 representing Federal income taxes for the year 1930; which was paid for you by the F. W. Fitch Company has been included as income to you.

2. A payment of \$298.82 also made by the corporation for attorney fees in connection with the taxes for the year 1930.

3. The income of the trust is held to be entirely taxable to you, therefore, \$7,128.00 or 60% of the net income paid to Mrs. Lettie S. Fitch has been included in your income.

Due to the fact that the expiration of the period provided in the statute of limitations will presently bar any assessment of additional tax on the return filed for the year 1933, the Income Tax Unit will be unable to afford you an opportunity to protest this determination or to be accorded a hearing prior to the mailing of this statutory notice of deficiency.

11 (Answer of Commissioner of Internal Revenue.)

Filed July 16, 1936, United States Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,

Docket No. 84748. vs.

Commissioner of Internal Revenue, Respondent.

Now comes the respondent, by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, and for answer to the petition of the above-named petitioner, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the year 1933; denies the remainder of paragraph 3 of the petition.

4. Denies that the respondent erred as alleged in paragraph 4 of the petition, subparagraph (a) to (c), inclusive.

5. Denies the material allegations of fact contained in paragraph 5 of the petition, subparagraphs (a) to (c), inclusive.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

HERMAN OLIPHANT,
General Counsel for the
Department of the Treasury.

Of Counsel:

C. A. Ray, Special Attorney,
Bureau of Internal Revenue.
CAR/mpc 7-15-36

12 (Opinion of United States Board of Tax Appeals.)

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

Arnold F. Schaetzle, Esq., for the petitioner.

Harold D. Thomas, Esq., for the respondent.

Memorandum Findings of Fact and Opinion.

The Commissioner determined a deficiency of \$1,967.26 in petitioner's income tax for 1933 in part by adding to income an amount paid to petitioner's divorced wife from the income of a trust which he created two years prior to divorce. Petitioner contends that the trust was not created to discharge a marital obligation and that he is not taxable on its income. Other issues were settled. The case was submitted upon a stipulation.

Seal

U. S. Board of
Tax Appeals
1924.

Findings of Fact.

Petitioner, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892.

13 They lived together as husband and wife until 1917, and had four children. In that year they separated.

In 1919 petitioner purchased a home for his wife at a cost of \$5,000, furnished it for her, and gave her an automobile. In the same year the F. W. Fitch Company was incorporated, and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to petitioner and 10 to his wife, who was elected vice-president and a director of the corporation; and by reason of petitioner's control, she received from it \$300 a month although she had no regular hours of employment and did not devote much time to its affairs.

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against petitioner in the District Court of Polk County, Iowa. This suit was dismissed on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, petitioner leased certain premises, owned by him, to the F. W. Fitch Company for 99 years at an annual rental of \$12,000, and on

April 23, 1923, joined his wife and the Bankers Trust Company as trustee in the execution of a trust agreement, under which the lease was transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch \$600 a month during her life and the remainder to petitioner during his life. Provision was made further for the trust's duration for at least 15 years and for distribution of the income to the children of petitioner and his wife in case either should die prior to the termination of the minimum period. Upon the creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and director of the F. W. Fitch Company, and received no further payments from it.

Seal

U. S. Board of
Tax Appeals
1924

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against petitioner in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against petitioner. In his answer petitioner alleged inter alia that he had created the above trust for her benefit in settlement of the prior suit for maintenance; that

* * * She is now and was receiving this \$600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. * * *
and that

This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

On December 17, 1925, the court entered a decree granting the wife an absolute divorce and the custody of the minor son and further providing

* * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified

and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Seal

U. S. Board of
Tax Appeals
1924

Pursuant to this decree petitioner transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch-Company, which on December 31, 1925, had a book value of \$77,959.80 and paid to her attorney the sum of \$23,500, of which she received \$8,500 and the balance represented counsel fees and expenses.

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch \$7,128 which the Commissioner included in petitioner's taxable income.

Opinion.

Sternhagen: The petitioner assails the Commissioner's inclusion of this amount in his gross income of 1933. The purpose of the trust's creation and the designation of the wife as a beneficiary to the extent of \$600 a month, payable out of its income, was, as shown by petitioner's answer in the divorce proceeding, the settlement of a suit begun by her for maintenance. When the trust took effect, she ceased to receive a monthly payment of \$300 which she had been receiving from the corporation of which petitioner was the principal shareholder; and when in 1925 she obtained an absolute divorce, the decree ratified and affirmed the trust settlement and "the property and alimony settlement made by the parties".

Seal

U. S. Board of
Tax Appeals
1924

The trust was intended to be and unquestionably was regarded by the divorce court as being a means whereby the husband discharged his marital obligation of support. The Commissioner correctly determined that the portion of the trust income paid to the wife was in satisfaction of this obligation and was, therefore, taxable to petitioner. *Douglas vs. Willcuts*, 296 U. S. 1, 16 A. F. T. R. 970; *Alsop vs. Commissioner*, 92 Fed. (2d) 148; *Helvering vs. Brooks*, 82 Fed. (2d) 173, 17 A. F. T. R. 585; *Commissioner vs. Hyde*, 82

Fed. (2d) 174, 17 A. F. T. R. 586; John Ernest Goldring, 36 B. T. A. 779; Stephen J. Leonard, 36 B. T. A. 563; 16 Robert Glendenning, et al., Executors, 36 B. T. A. 486 (on rev. C. C. A. 3); Albert C. Whitaker, 33 B. T. A. 865, rev. disms'd. 87 Fed. (2d) 1022, 18 A. F. T. R. 865.

Enter:

Judgment will be entered under Rule 50.

Entered Jan. 12, 1938.

Seal
of U. S. Board of
Tax Appeals
1924

17 (Order of Redetermination, March 10, 1938.)

United States Board of Tax Appeals.
Washington.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner of Internal Revenue, Respondent.

Judgment.

Subsequent to the Board's Memorandum Findings of Fact and Opinion, entered January 12, 1938, the respondent filed a proposed judgment which, after due notice, came on for hearing on March 9, 1938. No one appearing for the petitioner and no objections having been filed to the said proposed judgment, it is

Ordered, Adjudged and Decided that there is a deficiency of \$1,555.58 in income tax for 1933.

Enter:

Entered Mar. 10, 1938.

(Seal
of U. S. Board of
Tax Appeals.)

JOHN M. STERNHAGEN,
Member.

18 (Petition of F. W. Fitch for Review of Decision of
United States Board of Tax Appeals.)

Filed May 24, 1938. United States Board of Tax Appeals.
United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
P. T. A. Docket No. 84748 vs.
Commissioner of Internal Revenue, Respondent.

Petition for Review by the United States Circuit Court of
Appeals for the Eighth Circuit.

To the Honorable, The Judges of the United States Circuit
Court of Appeals for the Eighth Circuit:

I.

Jurisdiction.

F. W. Fitch, your petitioner, respectfully petitions this Honorable Court to review the decision of the United States Board of Tax Appeals entered on March 10, 1938, and finding a deficiency in income tax due from your petitioner for the calendar year 1933, in the amount of \$1,555.58.

Your petitioner, at the time of filing this petition, is a citizen of the United States and resides at Des Moines, Polk County, Iowa.

The return of income tax in respect of which the aforementioned tax liability arose was filed by your petitioner with the Collector of Internal Revenues for the Collection District of Iowa located in the City of Des Moines, State of Iowa, which is located within the jurisdiction of the Circuit Court of Appeals for the Eighth Judicial Circuit.

Jurisdiction in this Court to review the decision of the United States Board of Tax Appeals aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926 as amended by Sections 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932, and 519 of the Revenue Act of 1934.

II.

Nature of Controversy.

Petitioner, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch to whom he was married in 1892. They lived together, as husband and wife, until 1917, and had four children. In that year they separated. In 1919 petitioner purchased a home for his wife at a cost of \$5,000.00,

furnished it for her and gave her an automobile. In the same year the F. W. Fitch Company was incorporated and acquired the assets of a predecessor partnership in exchange for 2,000 of its shares. Of these shares 1,860 were issued to petitioner and ten to his wife, who was elected vice-president and a director of the corporation; and by reason of petitioner's control, she received from it \$300 a month, although she had no regular hours of employment and did not devote much time to its affairs.

On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against the petitioner in District Court of Polk County, Iowa. This suit was dismissed on April 7, 1923 after the parties had agreed upon a settlement. In accordance with the settlement, petitioner leased certain premises owned by him, to The F. W. Fitch Company for 99 years at an annual rental of \$12,000; and on April 23, 1923, joined his wife and the Bankers Trust Company, as trustee, in the execution of a trust agreement, under which the lease was transferred to the trustee to hold title, collect the rents, and after the deduction of expenses to pay to Lettie S. Fitch \$600.00 a month during her life and the remainder to petitioner during his life. Provision was made further for the trust's duration for at least 15 years and for distribution of the income to the children of petitioner and his wife in case either should die prior to the termination of the minimum period. Upon the creation of this trust, the terms of which have been and are now being substantially complied with, the wife ceased to be an officer and director of The F. W. Fitch Company, and received no further payments from it.

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against petitioner in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner, and praying for the custody of the child, the only one then a minor, and for a money judgment against petitioner.

On December 17, 1925, the court entered a decree granting the wife an absolute divorce and the custody of the minor son and further providing

21 * * * that the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Pursuant to this decree petitioner transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which on December 31, 1925, had a book value of \$77,959.80 and paid to her attorney the sum of \$23,500, of which she received \$8,500 and the balance represented counsel fees and expenses.

During 1933 the trustee under the trust of April 23, 1923, distributed to Lettie S. Fitch \$7,128 which the Commissioner included in petitioner's taxable income.

The petitioner contended before the Board of Tax Appeals that the income from an irrevocable trust, created by a husband for the benefit of his wife two years before divorce proceedings are instituted, and which does not guarantee or secure recurrent payments in discharge of the marital obligation may not be regarded as taxable income to the husband. Income from the F. W. Fitch and Lettie S. Fitch Trust, said trust being an irrevocable trust, is distributable annually on the basis of 40% to petitioner and 60% to his former wife and is subject to the tax to the respective beneficiaries in said proportions under sections 161 and 162 of the Revenue Act of 1932.

Petitioner contended that during the year under review, the calendar year 1933, that no legal obligation rested upon the defendant to support his former wife and hence
22 income payable to her under an irrevocable trust, created in 1923 two years before divorce proceedings were contemplated or instituted may not be regarded as taxable income to petitioner.

Petitioner further contended that under decisions of the Supreme Court of the State of Iowa that the payment of a lump sum settlement by a husband pursuant to an absolute decree of divorce, terminates the obligation to further support the wife and completely discharges the marital obligation. Hence, when petitioner paid to his former wife the sum of \$77,959.80, represented in capital stock of The F. W. Fitch Company and paid to her attorney the sum of \$23,500, he completely discharged his marital obligation, and hence, during the year under review he had no such obligation to his former wife.

The Board of Tax Appeals held:

1. The trust was intended to be, and was unquestionably regarded by the divorce court as being a means whereby the husband discharged his marital obligation of support.
2. The Commissioner correctly determined that the portion of the trust income paid to the wife was in satisfaction of this obligation and was, therefore, taxable to petitioner.

III.

Assignment of Errors.

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors upon which your petitioner relies as the basis of this proceeding:

23 1. The Board erred in predicating its decision upon a finding that the divorce court regarded an irrevocable trust, created two years prior to the entry of a divorce decree, as a means whereby petitioner discharged his marital obligation to his former wife.

2. The Board erred in holding that the income, payable directly to a wife by the trustee, under an irrevocable trust created in 1923, two years previous to an absolute decree of divorce, was properly included as taxable income to petitioner in 1933.

3. The Board erred in failing to hold that a lump sum settlement made by petitioner with his former wife upon final divorce in 1925, completely discharged the marital obligation.

4. The Board erred in holding that there was any marital obligation or legal duty upon the petitioner to support his former wife in the year under review, i. e., 1933.

5. The Board erred in holding that any part of the income of the F. W. and Lettie S. Fitch Trust, payable directly to Lettie S. Fitch was taxable income to the petitioner for 1933.

6. The Board erred in holding that there was any deficiency in income taxes due from petitioner for the year 1933.

24 Wherefore, your petitioner prays that this Honorable Court may review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the Board to exclude from taxable net income of the petitioner for the year 1933, the sum of \$7,128.00 paid directly to Lettie S. Fitch by the Trustee of the F. W. Fitch and Lettie S. Fitch Trust; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

A. F. SCHAETZLE,
Attorney for Petitioner,
402 Hubbell Bldg.,
Des Moines, Iowa.

State of Iowa,
County of Polk—ss.:

A. F. Schaetzle, being duly sworn, says:

I am the attorney for the petitioner in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information, and belief. This petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

A. F. SCHAETZLE.

Subscribed and sworn to before me this 20th day of May,
1938.

RUTH LITTELL,
Notary Public.

(Seal)

25 (Notice of filing of Petition for Review.)

Filed May 24, 1938, U. S. Board of Tax Appeals.

To:

Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

Herman Oliphant, Attorney for Respondent,

Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

You Are Hereby Notified that on the 24th day of May, 1938, a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the United States Board of Tax Appeals heretofore rendered in the above-entitled cause, was filed with the Clerk of the Board. A copy of the petition as filed is attached hereto and served upon you.

Dated 5/24/, 1938.

A. F. SCHAETZLE,
Attorney for Petitioner,
402 Hubbell Bldg.,
Des Moines, Iowa.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 24th day of May, 1938.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

26 (Stipulation of Facts.)

Filed at Hearing May 5, 1937, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

F. W. Fitch, Petitioner,
Docket No. 84748. vs.
Commissioner Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the petitioner and respondent in the above entitled case and by and between their respective counsel, that the following constitute the facts necessary for a determination of said case and same may be regarded as the facts in said case:

1. F. W. Fitch, petitioner, is a resident of Des Moines, Polk County, Iowa and duly filed a Federal Income Tax Return for the calendar year 1933.

2. Petitioner is president and principal stockholder of The F. W. Fitch Company, an Iowa corporation, engaged in the manufacture and sale of Fitch Hair Tonic and Shampoo and a general line of cosmetics. The manufacturing plant and principal place of business of the corporation is located in Des Moines.

3. Petitioner married Lettie S. Fitch on November 9, 1892 and they lived together as husband and wife until about 1917.

27 There was born to said petitioner and his said wife as the issue of their marriage, a son named Gail W. Fitch, born July 2, 1898; a daughter Mildred Fitch, born March 29, 1901; a daughter Lois Fitch, born September 1, 1902; and a son, Lucius W. Fitch, born March 27, 1906. Commencing about 1917 the petitioner and his said wife separated and ceased living together as husband and wife, setting up separate living establishments. In 1919 petitioner purchased a home for his said wife at a cost of about \$5,000.00, furnished said home for her and gave her an automobile.

4. On December 27, 1922 Lettie S. Fitch filed a suit for separate maintenance against the petitioner in the District Court

of the State of Iowa in and for Polk County. A copy of the Petition in the said suit for separate maintenance including motion for temporary alimony, etc. is hereto attached, marked Exhibit "A" and by this reference is made part hereof. Fred W. Fitch, the defendant in the said suit, filed no pleading whatsoever in the said suit.

5. After the filing of said suit for separate maintenance, the petitioner and his wife, through their counsel, entered into negotiations which resulted in the following transactions:

(a) April 1, 1923 petitioner (and his wife, for the purpose of releasing dower rights) entered into a lease agreement with The F. W. Fitch Company, under the terms of which the premises owned by the Petitioner were leased to The F. W. Fitch Company for a term of Ninety-nine years at an annual rental of \$12,000.00.

(b) April 7, 1923, the said suit for separate maintenance was dismissed without prejudice and the costs paid by Lettie S. Fitch, the plaintiff therein.

(c) On April 23, 1923 the trust agreement, a copy of which together with lease is marked Exhibit "B" and hereto incorporated by this reference, was executed. The terms of the said trust agreement have been and are now being substantially complied with by all parties concerned.

6. On April 14, 1925 Lettie S. Fitch filed suit for divorce in the District Court of Iowa, in and for Polk County. The pleadings of both parties in the said suit for divorce are hereto attached, marked Exhibit "C", and are by this reference made part hereof.

7. A copy of the final decree of the Court in the said suit for divorce, marked Exhibit "D" is attached hereto and by this reference made part hereof, and pursuant thereto petitioner transferred to Lettie S. Fitch 600 shares of the common stock of The F. W. Fitch Company which stock on December 31, 1925 had a book value of \$77,959.80, and paid to her attorney the sum of \$23,500.00 out of which she received the sum of \$8,500.00, the balance representing her counsel fees and expenses.

8. The F. W. Fitch Company was incorporated under the laws of Iowa in June of 1919. The Articles of Incorporation provided for an authorized capital stock of \$500,000.00 divided into 5,000 shares of the par value of \$100.00 each. On July 25, 1929 capital stock was issued for the assets of the predecessor partnership as follows:

Name	No. Shs.	Par Value
F. W. Fitch (Petitioner)	1,860	\$186,000.00
Lettie S. Fitch (Wife)	10	1,000.00
B. F. Kaufman	10	1,000.00
Gail W. Fitch (Son)	10	1,000.00
Frank Emmke	10	1,000.00
Geo. E. Davis	60	6,000.00
J. J. Kirby	20	2,000.00
J. A. Williams	20	2,000.00
	<u>2,000</u>	<u>\$200,000.00</u>

Lettie S. Fitch became Vice-President and a member of the Board of Directors of said corporation, though she had no regular hours of employment and did not devote much time to its affairs. Following incorporation in 1919, without regard to the value of her services, The F. W. Fitch Company by reason of petitioner's control thereof, paid her \$300.00 per month. After creation of the aforementioned trust on April 23, 1923 Lettie S. Fitch ceased being an officer and director of the company and received no further payments.

9. During the year under review the trustee of the trust mentioned in paragraph marked 5(c) above distributed under the terms of the said trust agreement \$4,752.00 to the petitioner and \$7,128.00 to Lettie S. Fitch. The petitioner included as taxable income in his income tax return for the year under review the said \$4,752.00 which he received from the said trustee. Respondent has added to the petitioner's income the sum of \$7,128.00 which is the portion of the trust income paid to Lettie S. Fitch under the terms of the said trust agreement.

Executed this 4th day of May, 1937.

A. F. SCHAEZLE,
Counsel for Petitioner.

MORRISON SCHAFFROTH.

Exhibit A.

Petition.

In the District Court of the State of Iowa in and for Polk County

Lettie S. Fitch, Plaintiff

No. 37321 vs. Equity

F. W. Fitch, Defendant.

Plaintiff states:

Par. 1. That plaintiff and defendant are residents of the city of Des Moines, Polk County, Iowa.

Par. 2. That she was married to the defendant, F. W. Fitch, at Liscomb, Iowa, on the 9th day of November, 1892. That there was born to plaintiff and defendant as the issue of said marriage, five children, four of whom now survive.

Par. 3. That subsequent to the marriage of plaintiff and defendant, the defendant without fault on the part of this plaintiff, began and continued abusing and mistreating plaintiff in such a cruel and inhuman manner as to impair her health and endanger her life.

Par. 4. That said defendant does not live with his wife and family, that he does not associate with them in their home and that he fails, refuses and neglects to maintain this plaintiff and support her in a manner comparable with his ability and their standing in the community.

Par. 5. That the defendant is a wealthy man and has an income of from \$50,000 to \$60,000 per year. That this plaintiff is without means of support other than that to which she is entitled as the wife of the said defendant.

Par. 6. That the business of defendant is the result of the original joint efforts of this plaintiff and defendant. That he has assumed all control over said business to the exclusion of this plaintiff and has failed to provide for her in a proper manner.

Wherefore plaintiff prays that she may have a decree of separate maintenance from the defendant awarding her a suitable sum under the circumstances for her support and maintenance during her lifetime, and impressing the property of the defendant with a lien guaranteeing the payment of such sum as the court shall find the plaintiff entitled to, and for attorneys fees, suit money and for such further, full and complete relief as may be equitable in the premises.

R. R. NESBITT

Attorney for Plaintiff.

State of Iowa,
County of Polk—ss.:

I, Lettie S. Fitch, first being duly sworn on oath depose and say that I am the plaintiff named in the foregoing petition. That I have read the same and know its contents and the statements and allegations therein contained are true and correct as I verily believe.

LETTIE S. FITCH

Subscribed and sworn to before me and in my presence by the said Lettie S. Fitch this 27th day of December
A. D. 1922.

R. R. NESBITT
Notary Public in and for
Polk County.

33 Motion for Temporary Alimony, Suit Money and
Attorneys Fees

In and for Polk County

Lettie S. Fitch, Plaintiff
No. 37321 vs. Equity
F. W. Fitch, Defendant

Comes now the plaintiff in the above-entitled cause and moves the court to require the defendant to pay into court a suitable sum as alimony, suit money and attorneys' fees, for her maintenance and in order to permit her to properly prosecute the above entitled action, and in support of said motion refers the court to the pleadings in said cause which are by reference, made a part hereof, and to the affidavit hereto attached.

Respectfully submitted..

R. R. NESBITT
Attorney for Plaintiff

34 State of Iowa,
County of Polk—ss.:

I, Lettie S. Fitch, first being duly sworn on oath depose and say that I am the plaintiff named in the above entitled cause. That I was married to the defendant as in said petition set out. That I have a cause of action against the defendant as in said petition set out. That I am informed by the defendant that he intends to make this an extended and expensive piece of litigation; that the trial of said cause will

require me to secure evidence from various points over the country, including Chicago, Kansas City and elsewhere out of the city, which will necessarily be expensive and such evidence will be necessary and proper in the prosecution of this case by the plaintiff.

That this plaintiff has no funds of her own with which to prosecute said cause of action, nor to pay her counsel for his services in said cause, nor to maintain herself and family during the pending litigation, other than the small salary of \$300.00 per month which is paid her as Vice President of the F. W. Fitch Company. That said salary is inadequate for the expense of herself and family, especially is this true in view of the fact that she has recently undergone a serious operation at the Methodist Hospital, and for which services she is still indebted.

That the defendant is a man of some means, being the owner of the lot upon which the building of the F. W. Fitch Company is now located and the owner of the building of the F. W. Fitch Company valued at \$150,000.00, subject to an encumbrance of some \$50,000 or \$60,000.

That he has an income therefrom of \$750.00 per month.

35 That he is an official of the F. W. Fitch Company, and draws a salary as president thereof in the sum of \$500.00 per month. That he is the owner of approximately 1,880 shares of stock in the F. W. Fitch Company, having a par value of \$100.00 each and that the said defendant received as a dividend on said stock for the year 1922, the sum of \$37,200.00. That in addition to the above, the defendant is the owner of an undivided interest in the Drummond Apartments in the City of Des Moines, Polk County, Iowa and this affiant is informed and believes that the interest of the defendant therein is that of two-thirds owner. That the said Drummond Apartments is of the approximate value of \$20,000.00. That he is the owner of a certain tract of land in Wisconsin of approximately 1000 acres of the approximate value of \$47,000.00. That he is also the owner, as this affiant is informed and believes, of stock to the value of \$1000.00 in the Bankers Trust Company of Des Moines, Iowa.

That the said defendant has no one depending upon him for support other than this plaintiff and two minor children, and all of the support of said minor children and of this plaintiff, excepting the expense of college education for one of said minor children and the bills for medical services and

for fuel, have been met by this plaintiff out of the small salary paid her as Vice President of the F. W. Fitch Company.

(Signed) LETTIE S. FITCH

Subscribed and sworn to before me and in my presence by the said Lettie S. Fitch this 10th day of January A. D. 1923.

R. R. NESBETT

Notary Public in and for Polk County, Iowa.

(Seal)

36

Exhibit B

Lease.

This indenture made and entered into this 1st day of April, A. D. 1923, by and between Fred W. Fitch of Des Moines, Iowa, party of the first part and hereinafter called lessor, and the F. W. Fitch Company, a corporation of Des Moines, Iowa, party of the second part and hereinafter called lessee, Witnesseth:

First. The party of the first part hereto, the said lessor, in consideration of the rents herein reserved and of the covenants and agreements hereinafter expressed on the part of the party of the second part, the lessee, and to be by it kept, performed and fulfilled have demised and leased, and do by these presents demise and lease unto the party of the second part the following described premises in the City of Des Moines in the County of Polk and State of Iowa, to-wit:

The South Seventy One (71) and One Half ($\frac{1}{2}$) feet of Lot Eight (8) in Block No. Forty-three (43) in Lyons Addition to Fort Des Moines, now forming a part of the City of Des Moines, Polk County, Iowa.

together with the four story factory building and basement situated thereon.

To Have and to Hold the above described premises with the rights, privileges, easements and appurtenances thereto belonging unto the said lessee for and during the term of ninety-nine (99) years from and after the first day of April, 1923, that is to say, until the 31st day of March, A. D. 2022 including both of said dates, paying rent therefor, performing various duties and obligations, and yielding possession thereof as hereinafter provided.

Second. The lessee, parties of the second part, covenant and agree to pay to the lessor, his assigns, legal representatives or trustee as rent for the demised premises a monthly rental of \$1000.00 payable in advance commencing on the first day of April, 1923 and payable on the first day of each month thereafter until the expiration of said 99 year period.

All rents are to be paid by the lessee to the lessor, his assigns, legal representatives or trustee at the Bankers Trust Company in the City of Des Moines, Iowa, or at such other place or places in the City of Des Moines, Iowa as the lessor, his assigns, legal representatives or trustee may from
37 time to time in writing designate, all in gold coin of the United States of America of or equal to the present standard of weight, fineness and value. All rent provided for in this lease shall bear interest at the rate of eight per cent per annum payable semi-annually after the same becomes due until paid.

Third. As a further consideration for the demising and leasing of the aforesaid premises, the said lessee further covenants and agrees to pay in addition to such rent reserved all taxes, special assessments, rates, charges and levies general and special of every name, nature and kind whatsoever including the light, heat and water, rates and other rates which may be charged, taxed, assessed, levied or imposed upon or against the property leased hereby whether the same be upon or against the leasehold estate hereby created, or upon or against the reversionary estate in said premises during the full term hereby granted and all such taxes, rates, charges, assessments and levies are to be paid as they become due and before they become delinquent, and lessee further agrees to obtain and deliver to the lessor duplicate receipts for all taxes, rates, charges, assessments and levies paid on any and all of said property, and such duplicate tax receipts shall be delivered to the lessor before said taxes or assessments would become delinquent if unpaid.

The said lessee is hereby authorized and empowered to sign any statutory waiver necessary to procure the right to pay any special rates and assessments in installments, but it is expressly understood and agreed, however, that the taxes, special assessments and rates to be paid hereunder by the lessees are all of the taxes, special assessments and rates now or that may hereafter become a lien upon said premises prior to the expiration of this lease whether the installments of the same are due before the expiration of this lease or not.

It is further agreed that in case of the non-payment of, or the failure of the lessee to pay and discharge any taxes, as-

38 assessments, rates, charges or levies as herein provided, or in case of the failure of the lessee to insure or to maintain insurance as provided in this lease, or to pay the premiums thereon, or to make the loss under said policies payable to or to deliver the same to the lessor, his assigns, legal representatives or trustee as provided in this lease, or in case of waste, or in the event of any other breach of or default by the lessees in any of the provisions, covenants or conditions of this lease, then in any such event the said lessor, his assigns, legal representatives or trustee may, at their option and without prejudice to any other right hereunder arising in consequence of such breach or default, procure or effect such insurance or pay such premiums, taxes, assessments, rates, charges or levies, or redeem from any sale or forfeiture made because of the non-payment thereof, or buy in said premises at any tax sale or expend whatever moneys may be necessary to repair, protect or preserve said premises, or to restore the same as herein agreed, and the amount of any and all payments so made in this behalf as well as all other moneys or sums advanced by the lessors, his assigns, legal representatives or trustee under the authority of or pursuant to any of the terms or provisions of this lease shall be forthwith repaid by the lessee to the lessor, his assigns, legal representatives or trustee with interest thereon at the rate of eight per cent per annum payable semi-annually from the date such moneys are paid by the lessor, his assigns, legal representatives or trustee until repaid, and such amounts and interest shall be admitted and taken and are hereby declared to be so much additional and further rent for the above demised premises, which shall be due and payable from the lessee to the lessor, his assigns, legal representatives or trustee at the next rent day after such amount shall have been paid by the lessor, his assigns, legal representatives or trustee, and the said lessor, his assigns, legal representatives or trustee shall have a lien for the repayment of the same and of every part thereof, to the same extent as for other rent herein reserved. In making such payments, it shall not be obligatory upon the lessor, his assigns, legal representatives or trustee to inquire into the validity of any such tax, assessment rate, charge or levy or into the validity of any such tax sale.

39 Fourth. The lessee further covenants and agrees that it will insure against fire during the full term of this lease any and all buildings or improvements that are now or may be placed or built upon said premises including insurance on buildings in course of construction in good, solvent and responsible company or companies to the amount of 80%

of the appraised value of said buildings now or hereafter thereon, said appraisement to be made every ten years from the date of this lease, and said insurance to cover the appraisement as made. It is further agreed that in the event of total destruction of the building or buildings that are now or may be placed upon said premises, the proceeds of said insurance shall go into a new building of equal or greater value than the one destroyed. All policies issued and renewals thereof of all such insurance upon said buildings and improvements, shall be issued in the name of the lessor, his assigns, legal representatives or trustee, with loss, if any, payable, first, to the lessor, his assigns, legal representatives or trustee, and, second, to the lessee or other parties as their interest may appear. All policies shall by the lessee be promptly delivered to the lessor, his assigns, legal representatives or trustee to be held by either of them as the case may be, as additional security for the rent and for the performance of other conditions hereof, including the re-building as herein provided.

It is further agreed that all insurance policies shall be so written that in the event of loss no insurance company shall have recourse upon the lessor, his assigns, legal representatives or trustee.

It is further agreed and covenanted that if at any time or times during the continuance of this lease or as often as any building or improvement on said premises, or any part thereof, shall be damaged, injured or destroyed, the lessee will at its own cost and expense, repair, restore and re-build the same upon the same general plan and dimensions and of equal or greater value as before said damage, injury or destruction, and the lessee will complete said repairs, or reconstruction with all reasonable diligence and will have said building or buildings repaired, restored and re-built ready for occupancy within 12 months from the time of such loss, damage, 40 injury or destruction making allowances for all delays occasioned or caused beyond the control of the lessee.

In case of any loss under any policy of insurance on any building or improvement on said premises the entire amount thereof shall be paid to and collected by the lessor, his assigns, legal representatives or trustee and after the payment of the costs of collection the balance shall upon notice from the lessee that they are ready to repair, restore or re-build said buildings, be paid to a responsible bank or trust company, as trustee, to be expended as hereinafter provided

for the repair, re-building and restoration or addition to said buildings or improvements and as additional security for the performance and observance by the lessee of the covenants of this lease.

The said insurance money so collected shall be paid out in reasonable installments from time to time upon certificates of competent, reputable local architect or architects employed by the lessee or upon such other evidence as may be satisfactory to the trustee and those doing work and furnishing material for said work, provided, however, that there shall be no payments made out of said funds until it shall appear that the lessee has made sufficient expenditures either in cash or material or both as together with the funds so held by the lessor, his assigns, legal representatives or trustee will be sufficient to fully complete free from any and all claims or liens arising on account of labor or material furnished for the repairs, restoration or re-building necessary to place upon said premises improvements equal to those injured, damaged or destroyed as heretofore provided, and it is further agreed and covenanted that such funds so held by the trustee shall not be used for the repair, re-building or restoration of buildings unless the lessee is not in default in the performance of any of the covenants or conditions of the lease. Any funds remaining in the hands of the lessor, his assigns, legal representatives or trustee, after repair, re-building or restoration of the building or buildings, shall be paid to the lessee.

41 In event, however, that the lessee shall fail to repair, restore or re-build any building or improvement on said premises or any part thereof damaged, injured or destroyed by fire, as herein provided or shall be in default in the performance of any of the covenants or conditions of this lease either before or at the time or before completion of said repairs, re-building or restoration of said buildings then and in such cases or either of them any insurance money in the possession of such lessor, his assigns, legal representatives or trustees shall be forfeited and paid to the lessor, his assigns, legal representatives or trustee herein to be retained and held by them as their property without prejudice, however, to any other rights or [remedies] of the lessor, his assigns, legal representatives or trustee under the lease or otherwise arising in consequence of any such default on the part of the lessee.

Fifth: If the lessee shall desire, it may at any time during the term of this lease erect a new building upon said

premises or make any alterations in or additions to the buildings now or then upon the leased premises, and in that event the lessee will complete and pay for all of the said work and improvements and will make good any impairment of the stability, carrying power or durability of any building altered or added to and will hold and save the lessor, his assigns, legal representatives or trustee and their property harmless from any loss, expense or liability whatsoever arising on account of the said work and from any loss, expense or liability for injuries to persons or property in any manner growing out of the same and that said improvement, alteration or repairs will be made in strict compliance with all national and state laws and all city ordinances, rules and regulations.

Sixth: Nothing in this lease contained shall be construed to authorize the lessee to do any act or make any contract so as to encumber in any manner the title of the lessor, his assigns, legal representatives or trustee in said land or buildings or any part thereof.

42 The lessee further covenants and agrees that the leased premises and any building or buildings which may at any time be thereon shall not be used for any improper or unlawful purposes and the said lessee will keep and maintain the same with all improvements and the sidewalks, steps and areas adjacent thereto in good, safe and sanitary condition at all times, and so as to conform to and be in compliance with all ordinances, statutes and laws applicable to the same, and the said lessee will protect and indemnify and forever save and keep harmless the lessor, his assigns, legal representatives or trustee, from and against any penalty, fine, damage, expense or charge imposed or assessed or incurred for any violation or breach of any of said ordinances, statutes or laws.

Seventh: The lessee further covenants and agrees that it will forever protect, indemnify and save harmless, the lessor, his assigns, legal representatives or trustee and their title and estate in said premises, including the land, buildings, improvements and leasehold interest created hereby, from and against any prescriptive or other right or easement whatsoever that might be acquired or established thereto or thereon, or to any part thereof, adverse to the title or estate now possessed by the lessor, his assigns, legal representatives or trustee and also from and against any and all penalties, fines, charges, liens, damages, costs, expense, demands and attorneys' fees and from and against any and all li-

ability or loss of any kind or character whatsoever arising or resulting during the continuance of this lease, from or on account of any acts or omissions of the lessee or either of them, their servants, agents and employees and from or on account of any acts or omissions of persons claiming by, through or under lessee or either of them, and from and against any and all other liabilities or loss whatsoever that said lessor, his assigns, legal representatives or trustee and said premises, may sustain including the building and improvements thereon, the intention and spirit of this lease being to obligate the said lessee in consideration of the rental as fixed to assume all liability and losses of every kind and character whatsoever, in addition to the rent provided for herein, so that the lessor, his assigns, legal representatives or trustee

43 shall be paid and shall receive said fixed net rent provided for herein, without any diminution or abatement whatsoever; and this lease shall at all times be so interpreted and construed that the rent reserved hereunder shall be and constitute a net remuneration to the lessor, his assigns, legal representatives or trustee from the lessee for the use of the ground and premises covered by this lease, during the full term of this lease and that the lessor, his assigns, legal representatives or trustee shall be to no further expense on account thereof or in connection therewith during the term of this lease, provided, however, that nothing herein contained shall require the lessee to pay any income or inheritance tax due from the lessor, his assigns, legal representatives or trustee.

Eighth: It is further understood and agreed that upon any failure of the lessee to perform or comply with the terms, provisions or covenants of this lease, to be by the said lessee kept and performed, or any one of them, if such failure shall continue for 90 days after written notice of such failure given by the lessor, his assigns, legal representatives or trustee to the lessee, then at the election of the said lessor, his assigns, legal representatives or trustee, such failure to perform the conditions or provisions of this lease or any of them, and continuation of failure after notice as above set forth, shall make the whole amount of rent for said term due and payable, and lessor, his assigns, legal representatives or trustee may proceed at law to collect the rent and apply the same less expenses on the indebtedness and hold lessee for the balance, or to declare a forfeiture of this lease and of all the rights of the lessee thereunder, and the lessee upon notice to them of such election by the lessor, his assigns, legal representatives or trustee, shall, within 90 days thereafter, quit and surrender said premises without

further notice to quit, and the lessor, his assigns, legal representatives or trustee may recover possession thereof by action of forcible entry and detainer, or in any other legal manner and upon such forfeiture of this lease, or upon its termination in any other manner, all of the rights and leases of any sub-tenants, holding under such lessee in and to any part of said premises, shall immediately cease and terminate without any notice whatsoever to them.

It is further agreed, that in the event the lessor, his assigns, legal representatives or trustee shall, without any fault on their part, be made party to any litigation commenced by or against the lessee, then the lessee shall pay all costs and attorneys' fees incurred by or against the lessors in connection with said litigation. The lessee shall and will also pay all costs and attorneys' fees incurred by or against the said lessor, his assigns, legal representatives or trustee in enforcing the covenants, agreements, terms and provisions of this lease.

It is further covenanted and agreed that the lessor, his assigns, legal representatives or trustee in addition to the lien given them by law, shall have a lien for all costs and attorneys' fees and for the rent reserved in this lease and for all taxes and assessments paid by the lessor, his assigns, legal representatives or trustee upon the land leased hereby and for the re-payment of all moneys advanced or paid by them if any, under this lease upon all buildings and improvements placed upon said premises and upon the leasehold estate hereby created, and such lien shall continue until the amounts due lessor, his assigns, legal representatives or trustee with interest are paid, and said lien may be enforced by the procedure for the enforcement of landlords liens or in any other lawful manner.

Ninth: All notices or demands provided for herein to be given or made by the lessor, his assigns, legal representatives or trustee may be made by personally delivering a copy of such notice or demand to the lessee or by mailing a copy of such notice or demand to the lessee at its last address known to the lessor, his assigns, legal representatives or trustee and by posting a copy of said notice upon said premises or by serving such notice or demand upon said lessee in any manner then provided by law for the serving of original notices in a suit at law.

Tenth: No waiver of any breach of any covenant, agreement or condition of this lease, shall be construed to be a waiver of any other such breach subsequently occurring, no matter when or how such waiver may be made.

Eleventh: Upon the expiration of this lease, either by lapse of time or otherwise, the lessee will surrender said premises with all improvements then thereon to the lessor, his assigns, legal representatives or trustee in good order, condition and repair, the usual wear occasioned by lapse of time alone excepted.

Twelfth: The said lessee further covenants and agrees that it will not assign this lease without first notifying the lessor, his assigns, legal representatives or trustee in writing of the name of such assignee, and such assignment shall not be valid until such assignee shall fully assume in writing all of the duties and obligations of the lessee, such assumption to be duly acknowledged by the assignee and duly recorded in the office of the Recorder of Polk County, Iowa, and a duplicate original of said assumption duly executed and acknowledged by the assignee and delivered to the lessor, his assigns, legal representatives or trustee, and all other and later assignments made by any assignee shall be subject to like requirements, duties and obligations in every respect.

The lessee shall cause this lease to be filed and recorded in the office of the Recorder of Polk County, Iowa.

The lessor, his assigns, legal representatives or trustee covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever claiming by, through, or under them.

Thirteenth: This indenture is intended to and does cover all of the agreements and representations between the parties hereto in relation to the above described premises, and the leasing thereof, and it is expressly agreed, in view of the length of the term of this lease, that no change or alteration thereof shall be made, nor shall any change or alteration thereof be held binding upon any of the parties hereto, nor shall any evidence be given or received thereof unless the same is reduced in writing and signed by each of the parties hereto, their legal representatives, successors or assigns.

46 Fourteenth: All the provisions, conditions and covenants of this lease, whether it be so expressed or not, shall bind and inure to the benefit of (as the case may be) the heirs, successors, executors, administrators, trustees and assigns of the respective parties hereto.

In Witness Whereof the parties hereto have executed this instrument in duplicate on the day and year first above written.

FRED W. FITCH,

Lessor.

LETTIE S. FITCH,

Wife of Lessor.

F. W. FITCH COMPANY,

By Fred W. Fitch, Pres.

By J. J. Kirby, Secy.

State of Iowa,
Polk County—ss.:

Be it remembered that on the 7th day of April, A. D. 1923, before me the undersigned notary public in and for said county, personally came Fred W. Fitch and Lettie S. Fitch, husband and wife, to me personally known to be the identical persons whose names are affixed to the within lease and acknowledge the execution of the same to be their voluntary act for the purposes herein expressed.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal on the date last above written.

EDITH WILLIAMS,

Notary Public, in and for
Polk County.

State of Iowa,
Polk County—ss.:

I, J. J. Kirby, on oath state that I am the Secretary and a director of the F. W. Fitch Company. That on the 7th day of April, A. D. 1923, the directors held a meeting at the office of the company at 11:00 o'clock a.m., majority of all of said directors being present in person; that the directors by unanimous vote adopted the following resolution:

That the President and Secretary be authorized to execute a lease with Fred W. Fitch as lessor for the following described premises:

The South 71½ ft. of Lot 8 in Block #43 in Lyons Addition to Fort Des Moines, now forming a part of the City of Des Moines, Polk County, Iowa,

together with the four story factory building and basement situated thereon, and to pay therefor for a term of ninety-

47 nine years from and after the 1st day of April, A. D. 1923, the net monthly rental of \$1000.00 per month, and were fully authorized to sign and execute for the said company the within lease.

Signed this 7th day of April, A. D. 1923.

J. J. KIRBY.

Subscribed in my presence and sworn to before me, a Notary Public in and for Polk County, Iowa, by the above mentioned J. J. Kirby, to me known to be the identical person named in and who executed the foregoing instrument, acknowledging that he executed the same as his voluntary act and deed and the voluntary act and deed of the Board of Directors of the F. W. Fitch Company.

EDITH WILLIAMS,
Notary Public, in and for
Polk County.

48 (Endorsed): #12976. Fred W. Fitch to F. W. Fitch Co. Filed for Record in Polk County, Iowa, on April 12, 1923.—893 page 100, Mrs. E. O. Fleur, Recorder. Pd. \$4.90.

49 Part of Exhibit B.
Agreement.

This Agreement made and entered into this 23rd day of April, A. D. 1923, by and between Fred W. Fitch and Lettie S. Fitch, husband and wife, both of Des Moines, Iowa, hereinafter referred to as Grantors, and the Bankers Trust Company, a corporation duly and legally organized under the laws of the State of Iowa, with its principal place of business at Des Moines, Polk County, Iowa, named as Trustee, and hereinafter referred to as Trustee,

Witnesseth, that

Whereas the Grantors desire to transfer and convey certain real estate located in Des Moines, Polk County, Iowa, and assign and transfer the lease thereon, with all the profits therefrom unto the said Trustee to be taken, received and thereafter held by the Trustee under the terms and conditions of this agreement and administered by it as hereinafter provided,

Now, Therefore, in consideration of the premises, the said Fred W. Fitch and Lettie S. Fitch, Grantors, do hereby sell and convey unto the Bankers Trust Company, as Trustee,

the following described real estate situated in the County of Polk and State of Iowa, to-wit:

The South Seventy-one and one-half ($S71\frac{1}{2}$) Feet of Lot Eight, (8), Block Forty-three (43), Lyons Addition to Fort Des Moines, now included in and forming a part of the City of Des Moines,

with all buildings and improvements thereon, or such as shall hereafter be constructed.

And the said Grantors do hereby assign, set over and transfer unto the Bankers Trust Company, as Trustee, the lease upon the real estate above described, more particularly described as follows: a lease dated 1st day of April, A. D. 1923, by and between Fred W. Fitch of Des Moines, Iowa, party of the first part, lessor and F. W. Fitch Company, a corporation of Des Moines, Iowa, party of the second part, lessee, by the terms of which agreement said property is leased for a term of 99 years from and after the 1st day of April, 1923.

50 Said conveyance and said lease and the income from the property and the rental thereof, however, are to be held in trust for the purposes and for the benefit of the persons hereinafter named and designated under and subject to the provisions and conditions, and with the powers and duties hereinafter set forth, and none other, excepting such as are incidental to the carrying out of the purposes of this agreement. To have and to hold the same unto the said Bankers Trust Company, as Trustee, and its successors in trust for and during the whole of the period described and designated as the trust period.

Article 1. The Trust period shall commence upon the execution of this instrument and shall exist during the lives of the following named persons, who are now living, namely, Fred W. Fitch and Lettie S. Fitch, and said trusteeship shall continue in any event for a period of fifteen years.

Article 2. During the whole of the trust period aforesaid, the trustee shall have full power and authority in the premises, subject to such limitations as are hereinafter set out as follows:

(1) To hold the title to said real estate and said lease, and the assignment thereof, and to do all things necessary and all things which are reasonable and proper for the best interest of said trust estate and the beneficiaries of this trust in caring for said real estate and carrying out the terms and conditions of said trusteeship, including the execution of

mortgages or extension thereof, for the purpose of refinancing any loans which may be secured by mortgage or mortgages on said property.

(2) It is expressly agreed that the said Fred W. Fitch shall pay off all encumbrances upon the property described and known as the South 71½ feet of Lot 8, Block 43, Lyons Addition to Fort Des Moines, now included in and forming a part of the City of Des Moines, with the buildings and all improvements thereon, within ten years from the date hereof, and he shall pay all interest on said mortgages as the same become due. And in the event the said Fred W.

51 Fitch shall de cease prior to having cleared the property of the encumbrances as above described; then said encumbrances shall be cleared from the proceeds of the estate of the said Fred W. Fitch, and shall be a prior lien and claim against the property of the estate of the said Fred W. Fitch. In case any mortgage on said property shall mature during the lifetime of the said Fred W. Fitch and the same is not paid by him, the said trustee is hereby given full and specific authority to enter into an agreement to extend the time of payment thereof or to refinance the same by the execution of a new note and mortgage for a like amount upon said property.

(3) In the event that the encumbrance has been paid as above provided during the lifetime of the said Fred W. Fitch, the above property shall not again be encumbered without the consent of the said Lettie S. Fitch, if living; or if deceased then of the beneficiaries named in this trust.

(4) In the event the lease now upon the premises is not carried out and it shall become cancelled or forfeited either for failure to comply with its terms or for any other reason, then the said trustee may lease said property with the consent of the said Lettie S. Fitch and Fred W. Fitch, or the survivor, upon the best terms and for such term as to the said trustee and the said Lettie S. Fitch and Fred W. Fitch or the survivor may deem proper, but it is understood and agreed that if the said trustee and the said Lettie S. Fitch and Fred W. Fitch or the survivor cannot agree as to the terms of such lease then the decision of the trustee shall be final. But in the event it becomes necessary to again lease the above described property, as in this section provided, the term of said lease shall not extend for more than five years beyond the termination of this trust.

(a) The said Trustee shall have power and authority to demand, collect, due and receipt for the rents, issues and

profits arising therefrom which may be had for the use of the property hereinbefore described.

52 (b) To bring, maintain and defend actions, both at law and equity involving, growing out of or in any wise affecting the property of this trust estate or the title thereto.

(c) To settle, and compromise, either before or after suit has been brought thereon, any claim asserted by or against such Trustee, or any property of this trust estate.

Article 3. The net income of the trust property, after deduction of all necessary, proper and reasonable expense of the trust estate and the compensation of the Trustee as hereinafter specified, shall be paid as follows:

(1) Six Hundred Dollars to Lettie S. Fitch, one of the Grantors named herein, on the first day of April A. D. 1923, and Six Hundred Dollars on the first day of each month thereafter during the life time of the said Lettie S. Fitch, and thereafter to her children hereinafter named, and their heirs as hereinafter provided, except that the fees of the trustee and expenses as hereinafter provided shall be deducted once each year.

(2) The balance of the net income shall be paid to Fred W. Fitch, one of the Grantors herein, during his lifetime, and thereafter to his children hereinafter named, and their heirs as hereinafter provided, except that the fees of the trustee and expenses as hereinafter provided shall be deducted once each year.

(3) In the event of the death of the said Lettie S. Fitch, grantor herein, prior to the expiration of the trust period as herein provided, the Six Hundred Dollars per month, after the deduction of all necessary, proper and reasonable expenses of the trust, including the compensation of trustee hereinafter specified, shall be paid monthly as follows:

(a) One fourth to Gail W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

53 (b) One fourth to Mildred Fitch Young, daughter of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

(c) One fourth to Lois Fitch Sandahl, daughter of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

(d) One fourth to Lucius W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

(4) In the event of the death of said Fred W. Fitch, grantor herein, prior to the expiration of the trust period as herein provided, then the amount provided for and payable to said Fred W. Fitch as hereinbefore provided, after the deduction of all necessary, proper and reasonable expenses of the trust, including the compensation of the trustee hereinafter specified shall be paid monthly as follows:

a. One-fourth to Gail W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

b. One fourth to Mildred Fitch Young, daughter of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

c. One fourth to Lois Fitch Sandahl, daughter of grantor, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

d. One fourth to Lucius W. Fitch, son of grantor, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

(5) In the event of the death of both the said Fred W. Fitch and Lettie S. Fitch, prior to the expiration of the fifteen year period herein provided, then the amount
54 designated herein as payable to the said Fred W. Fitch and Lettie S. Fitch, after the deduction of all necessary proper and reasonable expenses of the trust, including the compensation of the trustee hereinafter specified, shall be paid monthly as follows:

a. One fourth to Gail W. Fitch, son of grantors, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

b. One fourth to Mildred Fitch Young, daughter of grantors, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

c. One fourth to Lois Fitch Sandahl, daughter of grantors, and to the lawful heirs of her body, by lawful marriage, subject to limitations hereinafter provided.

d. One fourth to Lucius W. Fitch, son of grantors, and to the lawful heirs of his body, by lawful marriage, subject to limitations hereinafter provided.

Article 4. If at any time during the whole trust period herein provided any cestui que trust shall die without lawful heirs of his or her body surviving, said decedent's share of the net income of the trust estate shall be equally divided among the other cestuis que trustent per stirpes and not per capita, the intention of this article being that the said children of the grantors and their lineal descendants and no one else shall take, have and enjoy the net income of and from the trust property and estate aforesaid, and that such lineal descendants shall take per stirpes and not per capita.

Article 5. The payments of the net income to the cestuis que trustent as provided herein shall be made only upon the following express conditions, after the death of either or both grantors, according to the provisions of this trust as herein provided. Each installment shall be payable and shall be paid only to each cestui que trust personally and shall not be paid to any other person or persons, corporation or other organization, by reason of any assignment or transfer
 55 by operation of law or otherwise of any supposed or possible right of anyone of said cestuis que trustent to receive the same. And in the event that any one of the said cestuis que trustent shall by operation of law, or by reason of any act of his or hers be barred or prohibited from receiving the payment of any installment and applying the same to his or her own use, such installment shall not be payable to him or her, but shall be payable by said trustee to the husband or wife of such cestui que trust, and if such cestui que trust have no husband or wife living with him or her then to his or her eldest next of kin, which money so paid to said husband, wife or next of kin, as the case may be, shall be applied to the care, board and keep and clothing of said cestui que trust, as far as may be proper or necessary in the judgment of the trustee. In the event of the mental incapacity of any one of the said cestuis que trustent, the amount payable to him or her hereunder shall be payable to their legal representative.

Article 6. The fees of the Trustee shall be one per centum of the income of the said Trust Estate to be deducted once each year by the Trustee, proportionally, from the share of each beneficiary of this trusteeship.

All necessary expenses of the trustee in carrying out the trust and including attorney fees in case it shall become necessary to employ attorneys shall be paid from the income of the estate proportionally and in the same manner as the payment of fees of trustee.

Article 7. In the administration of the trust aforesaid and in the accounting for and distribution of it, the trustee shall be held only to ordinary care and faithfulness, and in no wise be held liable or accountable for errors in judgment.

Article 8. It is understood and agreed that this trust period shall continue during the life time of Fred W. Fitch and Lettie S. Fitch and in any event for a period of fifteen years, that is to say, in the event the said Fred W. Fitch and Lettie S. Fitch shall die prior to fifteen years from the date of this instrument, then the trust period shall continue until fifteen years from the date of this trust agreement and in the event the said Fred W. Fitch and Lettie S. Fitch or either of them be living fifteen years from the date of this trust agreement, then this trust period shall continue, in any event, until the death of the said Fred W. Fitch, and in any event, until the death of the said Lettie S. Fitch, if she survive the said Fred W. Fitch.

Article 9. At the expiration of the trust period hereby created, said trustee shall account for, pay over, distribute, assign and convey unto the children of the grantors heretofore named and to their lineal descendants the trust property and estate then remaining in the hands and under the control of said trustee, said lineal descendants to take per stirpes and not per capita.

Article 10. In the event that the Bankers Trust Company shall become unable or unwilling to further act as trustee, then any judge of the District Court of Polk County, Iowa, exercising the powers conferred upon him by the District Court of Iowa √ shall be authorized, upon the application of a beneficiary, or beneficiaries herein named, to appoint as trustee any one of the five banks or trust companies located in Des Moines, Polk County, Iowa, having the largest amount of capital, surplus and undivided earnings. And in case of such vacancy and appointment of a new trustee, the trust fund and the real estate herein conveyed shall immediately vest in such trustee who shall exercise all the powers and be under all of the obligations imposed under this instrument upon the Bankers Trust Company, Trustee.

In Witness Whereof, we have hereunto subscribed our names the day and year first above written.

FRED W. FITCH,
LETTIE S. FITCH.

57 State of Iowa,
Polk County—ss.

Be it remembered that on this 23rd day of April, A. D. 1923, before me, the undersigned, a Notary Public in and for Polk County, Iowa, personally appeared Fred W. Fitch and Lettis S. Fitch, husband and wife, to me personally known to be the identical persons named herein, and who signed and executed the foregoing instrument and acknowledged the execution of the same to be their voluntary act and deed, for the purposes herein set out.

In Witness Whereof, I have hereunto affixed my official seal this 23rd day of April, A. D. 1923.

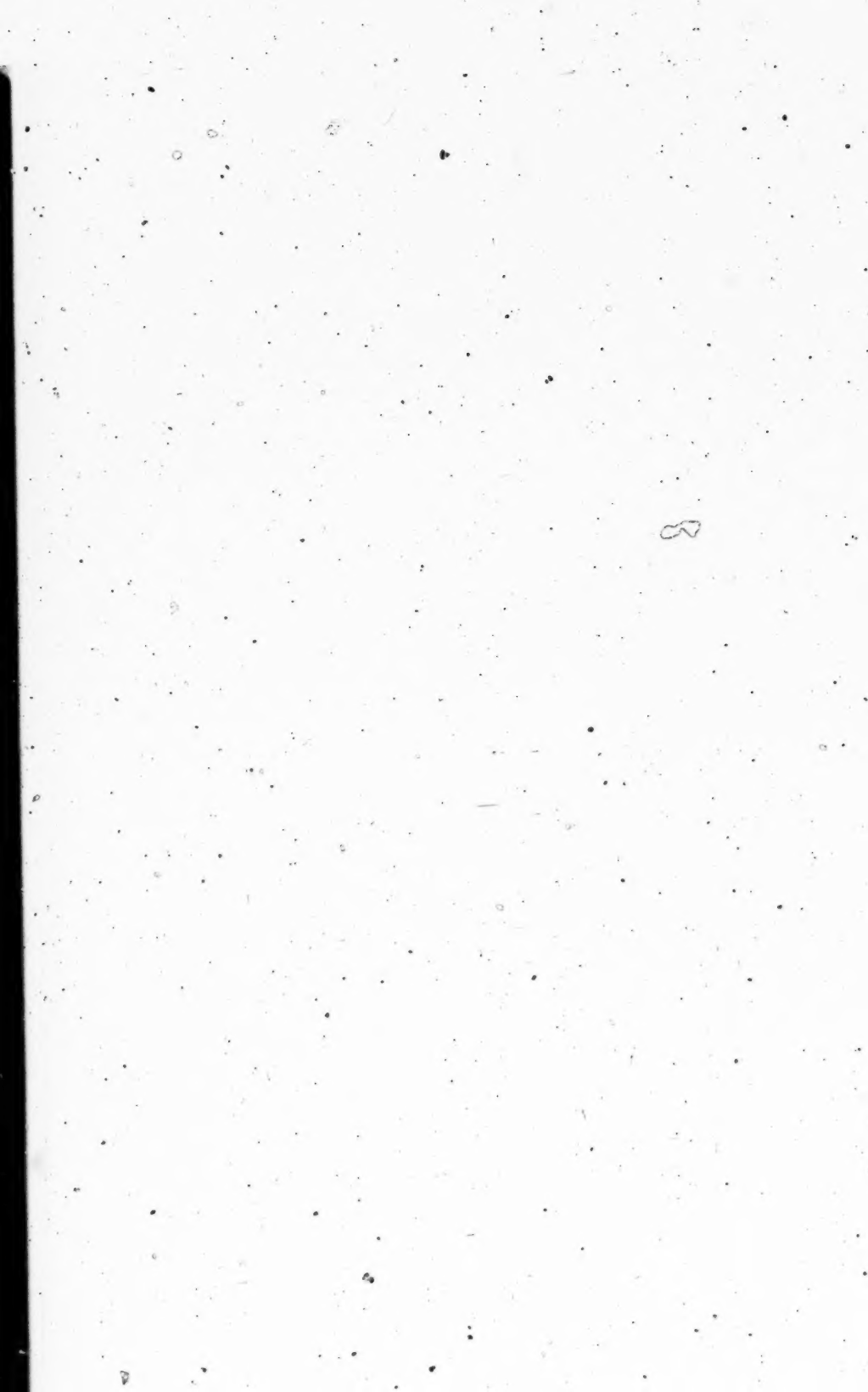
C. C. STORM,
Notary Public in and for Polk
County Iowa.

The Bankers Trust Company, a corporation organized and existing under the laws of the State of Iowa, does hereby accept the trust by the foregoing instrument created.

In Witness Whereof the Bankers Trust Company has caused its name to be signed by its Vice-President and Secretary this 24th day of April, A. D. 1923, with the seal of the company affixed.

BANKERS TRUST COMPANY,
By L. B. Bartholomew,
Vice-President.

By S. C. Pidgeon, Secretary.



State of Iowa:

Polk County :

ss.

On this 24 day of April, A. D. 1923, before me _____
a Notary Public within and for said County, personally appeared L. B.
Bartholomew and J. C. Pidgeon, both to me personally known, who, being
by me duly sworn, did say that they are the Vice President and
Secretary, respectively, of the Bankers Trust Company, a corporation
and that the seal affixed to said instrument is the corporate seal
of said corporation, and that said instrument was signed and sealed in
behalf of said corporation by authority of its Board of Directors, and
the said L. B. Bartholomew and J. C. Pidgeon acknowledged said instrument
to be the voluntary act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my
official seal at Des Moines, Iowa, the day and date last above written.

Notary Public

Trust Agreement

*Jud W Fitch and
Lettie J. Fitch*

To

*Bankers Trust Co.
as Trustee*



60

Exhibit C.
Certificate.

State of Iowa,
Polk County—ss.

I, Neva B. Chrisman, a Notary Public in and for Polk County, Iowa, hereby certify that I have compared the attached copy of the petition, together with two amendments thereto, with the originals filed in the office of the Clerk of the District Court, Polk County, Iowa and said copies are true and exact copies of the originals.

Dated this 29th day of October 1936.

NEVA B. CHRISMAN,
Notary Public.

(Seal)

61

Petition in Equity For Divorce.

In the District Court of the State of Iowa in and For
Polk County.

Lettie S. Fitch, Plaintiff,
Divorce No. 2550. vs.
Fred W. Fitch, Defendant.

Comes now the plaintiff, Lettie S. Fitch, and for cause of action against the defendant, Fred W. Fitch, states:

Paragraph 1. That she is now and has been for the last year and more a resident of the City of Des Moines, Des Moines Township, Polk County, State of Iowa.

Paragraph 2. That her residence as above stated has been in good faith and not for the purpose of obtaining a divorce only.

Paragraph 3. That this application is made in good faith and for the purposes set forth herein.

Paragraph 4. That the plaintiff and the defendant were married at Liscomb, Iowa, on the 9th day of November, 1892, and have lived together as husband and wife until about 1917.

Paragraph 5. That during all of the time the plaintiff and defendant so lived together as husband and wife, this plaintiff at all times conducted herself towards her said husband as a dutiful and loving wife.

Paragraph 6. That beginning a number of years ago and with continuing and increasing design and purpose, the defendant has subjected this plaintiff to such cruel and inhuman treatment as to endanger her life and health. That he has subjected her to continuing and increasing humiliation in person and with others, and has continuously advised her to obtain a divorce from him, and that in the event of her failure so to do he would undertake to procure a divorce from the plaintiff.

Paragraph 7. That this plaintiff is informed and believes, and hence alleges the fact to be, that the defendant moved to Reno, Nevada, sometime during January, 1925, and has established a purported temporary residence there with the open and avowed fraudulent purpose of continuing there a sufficient time to obtain a divorce from this plaintiff and deprive her of her property rights.

Paragraph 8. That during the year 1917, the defendant in violation of his marriage vows and without any fault of plaintiff wilfully deserted this plaintiff and has ever since absented himself from her without any reasonable or just cause therefor.

Paragraph 9. That there was born to plaintiff and defendant as the issue of said marriage, a son named Gail W. Fitch, who is now an adult; a daughter, Mrs. Mildred Fitch Young, who is now an adult; a daughter, Mrs. Lois Fitch Sandahl, who is now an adult; and a son Lucius W. Fitch, who is now nineteen years of age who is now residing with plaintiff and has ever since his birth, and who is now in college and is supported by the plaintiff.

Paragraph 10. That the defendant is possessed of personal property consisting of 2182 shares of the capital stock of the F. W. Fitch Company of the par value of \$218,200, and this plaintiff is informed and believes that the actual value of said stock is greatly in excess of \$400,000.00, and is informed and believes that the earnings from said stock is in excess of \$50,000 per annum.

Paragraph 11. That the defendant is possessed of other personal property of substantial value and real property situated in Des Moines, Polk County, Iowa, of substantial value, a more particular description of which this plaintiff is unable to give.

Paragraph 12. This plaintiff is informed and believes, and hence alleges the fact to be, that the defendant has made an alleged fraudulent transfer of a large portion of his stock

in the F. W. Fitch Company for the purpose of defeating this plaintiff's rights therein, and in aid of his avowed purpose of divorcing this plaintiff from him and of not contributing to her welfare or support, and of not making a fair and equitable distribution of the products of their joint endeavor, and of defeating the rights of their children to share in said property, but this plaintiff alleges that said transfer was without consideration and void.

Paragraph 13. That the defendant has excluded the plaintiff from all control over the business of the F. W. Fitch Company which was organized and developed by the continuous joint efforts of the plaintiff and the defendant, and has failed to provide for her and their minor child in a proper manner.

Paragraph 14. That the defendant claims to be a non-resident of the State of Iowa and has property within the State of Iowa as above mentioned, and that this plaintiff is entitled to an attachment against sufficient of said property to be held to satisfy the judgment or decree of the court herein.

Wherefore, this plaintiff, Lettie S. Fitch, prays that she be granted an absolute decree of divorce from the defendant, Fred W. Fitch: That she be restored to all of the rights, privileges and immunities of a single and unmarried person;

that she be granted and given the custody and control of their minor son, Lucius W. Fitch, and that she be given a judgment against the defendant for One Hundred Seventy-Five Thousand and no/100 (\$175,000) Dollars, and for a reasonable attorney's fee, and for the costs of this action, and that said amount be decreed to be a lien upon the aforementioned property; and that an order issue for an attachment on the property of the defendant within the State of Iowa to make said amounts, and for such other and further relief as may be equitable in the premises.

CLARK & BYERS
Attorneys for Plaintiff.

State of Iowa
Polk County—ss.:

I, Lettie S. Fitch, being first duly sworn on oath depose and say that I am the person named as plaintiff in the above entitled cause; that I have read the above and foregoing petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

LETTIE S. FITCH

Subscribed and sworn to before me by the said Lettie S. Fitch, this 14th day of April, 1925.

VIOLET TROE

(Seal)

Notary Public in and for Polk County Iowa.

65

Amendment to Petition.

In the District Court of the State of Iowa in and For Polk County.

Lettie S. Fitch, Plaintiff

Divorce No. 2550. vs.

Fred W. Fitch, and Gertrude Westberg, Defendants.

Comes now the plaintiff, and for amendment to her petition and for cause of action against the defendant Gertrude Westberg, states as follows:

Paragraph 1. That she reaffirms each and every allegation in paragraphs one (1) to fourteen (14), inclusive, in her original petition.

Paragraph 2. That the defendant Gertrude Westberg is a resident of the City of Des Moines, Des Moines Township, Polk County, State of Iowa.

Paragraph 3. That heretofore and prior to the 6th day of January 1925, the defendant Fred W. Fitch and the defendant Gertrude Westberg entered into a conspiracy against this plaintiff, whereby it was agreed that the defendant Fred W. Fitch should leave the State of Iowa, and should thereafter remain out of the State of Iowa and beyond the jurisdiction of this court, and that the defendant Fred W. Fitch should convey to the defendant Gertrude Westberg eighteen hundred ten (1810) shares of the stock in the F. W. Fitch Company, a corporation, to be held by the defendant Gertrude Westberg in secret trust for the use of the defendant Fred W. Fitch, with the intent on the part of the defendants, and each of them, to cheat and defraud this plaintiff, and to keep her from obtaining or receiving any part of the property of her said husband for her support, or for her separate maintenance or alimony under order of this court, and with the intent of removing all of said property of the defendant Fred W. Fitch from the jurisdiction of this court, and to render it impossible for this plaintiff to obtain separate maintenance or [alimony] out of said property or from the defendant Fred W. Fitch.

66

Par. 4. That in pursuance of said conspiracy, and with the intent on the part of both the defendant Fred W. Fitch and the defendant Gertrude Westberg to cheat and defraud this plaintiff, and without consideration and for the purpose of having the defendant Gertrude Westberg hold said property in secret trust for the defendant Fred W. Fitch, and for the purpose of removing the defendant Fred W. Fitch's property beyond the jurisdiction of this court, the defendant Fred W. Fitch, on or about the 6th day of January, 1925, secretly made a pretended transfer of the eighteen hundred ten (1810) shares of the capital stock of the F. W. Fitch Company to the defendant Gertrude Westberg, and caused the issuance of Certificate No. 15 of the F. W. Fitch Company to the defendant Gertrude Westberg for eighteen hundred ten (1810) shares of the capital stock of the F. W. Fitch Company.

Par. 5. That shortly thereafter, and some time during January, 1925, the defendant Fred W. Fitch absented himself from the State of Iowa and has established a purported temporary residence in Reno, Nevada, with the open and avowed fraudulent purpose of defeating this court of its jurisdiction and of obtaining a divorce from the plaintiff, and of depriving her of her property rights in said stock.

Par. 6. That thereafter, and some time during April 1925, the defendant Gertrude Westberg removed herself from the jurisdiction of this court, and this plaintiff
67 is informed and believes, hence alleges that fact to be, that she is now outside of the State of Iowa, and this plaintiff alleges that said defendant Gertrude Westberg left the State of Iowa for the purpose of ousting this court of jurisdiction over the property above referred to, and of defeating this plaintiff's rights in said property.

Par. 7. That said eighteen hundred ten (1810) shares of stock is the property of the defendant Fred W. Fitch subject to the rights of the plaintiff therein, and that said alleged and purported transfer of said stock which was made heretofore and on or about the 6th day of January, 1925, to the defendant Gertrude Westberg was void and of no force and effect and a fraud upon this plaintiff and this court, and that this plaintiff is the absolute owner of an interest in said property, and that the defendant Gertrude Westberg's claim in said property is fraudulent and void, and that the plaintiff's right to and interest in said property, and her rights to a divorce and alimony and attorney's fees and costs had become fixed and absolute prior to that date as the defendants well knew.

Wherefore, plaintiff prays as in her original petition, and that the amounts claimed in said petition be decreed to be a lien upon the property of the defendant Fred W. Fitch, including the said eighteen hundred ten (1810) shares of stock in the F. W. Fitch Company; that any claim of the defendant Gertrude Westberg to said eighteen hundred ten (1810) shares of stock be adjudged to be fraudulent and void, and that the pretended transfer thereof to said Gertrude Westberg be set aside and held for naught; that the transfer thereof upon the books of said corporation issuing said stock be cancelled, set aside and held for naught; and that the attachment on said eighteen hundred ten (1810) shares of stock heretofore made herein be decreed to be valid as against both of said defendants and that the defendant Fred W. Fitch be ordered to transfer said stock to this plaintiff and that in default thereof a commissioner be appointed to transfer said stock to this plaintiff, and for such other and further relief as may be equitable in the premises.

CLARK & BYERS,
Attorney for Plaintiff.

State of Iowa,
Polk County—ss.:

I, Lettie S. Fitch, being first duly sworn on oath depose and say that I am the person named as plaintiff in the above entitled cause; and that I have read the above and foregoing amendment to petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

LETTIE S. FITCH.

Subscribed and sworn to before me by the said Lettie S. Fitch, this 4th day of May, 1925.

(Seal) GREGORY BRUNK,
Notary Public in and for
Polk County, Iowa.

69 Second Amendment to Petition.

In the District Court of the State of Iowa, in and for
Polk County.

Lettie S. Fitch, Plaintiff,
#2550. vs. Divorcee.

Fred W. Fitch, and Gertrude Westberg, Defendants.

Comes now the plaintiff and for second amendment to her petition states as follows:

Paragraph 1. That the defendant, Gertrude Westberg, herein, was formerly a resident of the State of Iowa, and this

plaintiff is informed and believes, and hence alleges the fact to be, that the defendant, Gertrude Westberg, has departed therefrom with intent to avoid the service of an original notice and keeps herself concealed for said purpose.

Wherefore, plaintiff prays as in her original petition as amended.

CLARK & BYERS,
Attorneys for Plaintiff.

State of Iowa,
Polk County—ss.:

I, Lettie S. Fitch, being first duly sworn on oath depose and say that I am the person named as plaintiff in the above entitled cause; that I have read the above and foregoing second amendment to petition and know the contents thereof, and that the statements therein contained are true as I verily believe.

LETTIE S. FITCH.

Subscribed and sworn to before me this 3rd day of June, 1925.

(Seal)

GREGORY BRUNK,
Notary Public in and for
Polk County, Iowa.

70

Certificate.

State of Iowa,
Polk County—ss.:

I, Neva B. Chrisman, a Notary Public in and for Polk County, Iowa, hereby certify that I have compared the attached copies of answer of Fred W. Fitch and Gertrude Westburg, together with an amendment thereto, with the originals filed in the office of the Clerk of the District Court, Polk County, Iowa, and said copies are true and exact copies of the originals.

Dated this 29th day of October 1936.

(Seal) NEVA B. CHRISMAN,
Notary Public.

71 Answer of Fred W. Fitch.

In the District Court of Iowa, in and for Polk County.

Lettie S. Fitch, Plaintiff,
No. 2550 vs. Divorce
Fred W. Fitch, Defendant.

For answer to the plaintiff's petition, the defendant states:

Par. 1. The defendant admits paragraph 1 of plaintiff's petition.

Par. 2. The defendant admits paragraph 2 of plaintiff's petition.

Par. 3. The defendant admits paragraph 9 of plaintiff's petition.

Par. 4. The defendant admits paragraph 2 of plaintiff's first amendment to petition.

Par. 5. The defendant denies paragraph 3 of plaintiff's amendment to petition.

Par. 6. The defendant denies paragraph 4 of plaintiff's amendment to petition.

Par. 7. As to paragraph 5 of plaintiff's amendment to petition, the defendant denies that he has any fraudulent purpose of defeating this Court of its jurisdiction or of depriving the plaintiff of any property rights in the said stock, and alleges the fact to be that the plaintiff has no property rights in said stock.

Par. 8. The defendant denies paragraph 3 in plaintiff's petition, and alleges the fact to be that her application for [divorce] is not made in good faith, but is made through spite and vindictiveness, and the defendant is informed and alleges the fact to be that it is not made with the intention of securing a divorce, and, that she purposely and in bad faith alleges to this Court that this defendant has failed to provide for her and her minor child, and she has in fact concealed from this Court in her original petition the fact that two years ago this defendant conveyed in trust for her benefit the only sure and tangible property that he possessed, which property guarantees to her throughout the balance of her life that she shall receive \$600.00 in cash on the first day of every month, a more specific statement as to this conveyance in trust being hereinafter set out.

Par. 9. The defendant denies paragraph 13 in plaintiff's petition in which she alleges that the business of the F. W. Fitch Company was organized and developed by the joint efforts of plaintiff and defendant, but alleges the fact to be that it was organized and developed despite her bitter opposition and against her often repeated protest up until the time it became evident that the defendant was making of it a financial success.

Par. 10. For the purpose only of disclosing to this Court the absence of equity in the plaintiff's claims and prayer for alimony, attorney fees, Court costs and corporate stock, the defendant states:


That at the time and subsequent to the marriage of plaintiff and defendant, the defendant owned a small barber shop and began, in a very small way, to build up a hair tonic business while conducting his shop. When the defendant reached the point where he felt he could safely discontinue the barber business and devote his time to making and selling hair tonic, the plaintiff gave spirited opposition thereto upon the grounds that the hair tonic business was disgraceful, undignified and would cause her to lose standing with her friends.

73 Working alone in the defendant's barber shop, he was at first not always able to be at home promptly when meals were ready. The plaintiff thereupon began to complain, find fault and nag. Disagreements started and have been continuous since, with the plaintiff finding fault with the defendant's business, unwilling to co-operate while the business was small because of the disgrace its character brought upon her, and when it became large and prosperous, making unreasonable demands upon the defendant to supply her various relatives with employment, positions, sinecures, and money regardless of their ability or competency.

When the business was very small, the plaintiff's health being poor, the defendant did the family washing and made every personal sacrifice of that character and otherwise to save money with which to build it up, and when it began to grow and the defendant would go out on the road to sell his products, drawing barely the money necessary for road expenses, the plaintiff would demand an equal amount to spend in the activities of the W. C. T. U., and Prohibition cause, etc.

When the defendant had succeeded despite the plaintiff's opposition and lack of cooperation by virtue of continuous effort at the [expnse] of his health and nerves to make his business national in its scope, the plaintiff became exacting in her demands, ambitious to be known as a woman of affairs, desirous that the children of plaintiff and defendant should not learn to work and accomplish, but be placed upon allowances, and she maintained the attitude after the business was established that it just came to the defendant as a matter of course and would go on regardless of executive ability and foresight, and she interfered with its management and policies and nothing the defendant could do would please her either in domestic affairs or business; although a good woman morally, she was demanding, exacting, nagging, suspicious and unreasonable until, with the defendant's

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business cares and ill-health, in desperation the separation of plaintiff and defendant became inevitable; because of her actions as a contributing cause, the defendant suffered a nervous breakdown in the year 1909, underwent a serious operation, became an invalid for four years, compelled to have the care and attention of nurses a great deal of the time, and will be able to live in the future only by the strictest adherence to the instructions of physicians and surgeons as to the manner and method of living.

That in the year 1917 when, as plaintiff alleges in paragraph 4 of her petition, the plaintiff and defendant separated, the company suffered a heavy loss, the financial burden was a crushing one and the defendant requested the plaintiff to cooperate with him in economizing, explaining to her his confidence in being able to retrieve the situation and place the business upon a firmer bases, and she refused cooperation and continued to spend money lavishly and complained as she now complains in her petition, though receiving \$600.00 cash each month, that she did not have enough to live properly in accordance with her supposed station in life.

That throughout the married life of plaintiff and defendant, this defendant has been economical while the plaintiff has spent money lavishly, it costing this defendant from three to five times as much for her support as for his own.

That after the defendant had nevertheless succeeded in pulling the company through and establishing it on a firmer foundation, on the day of December, 1922, she filed a petition in this Court for separate maintenance, being docketed in this Court as Lettie S. Fitch vs. F. W. Fitch, Equity No., which by this reference is made a part hereof, and on or about the 23rd day of April 1923, this defendant settled the said suit with her by a trust agreement, being executed and filed in the Recorder's office of this County, and being found in Book 870 on Page 502 of the Records of the Recorder of this County, which, by this reference is made a part hereof, and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, by the terms of which the large factory building which houses the F. W. Fitch Company and was and is the only sure and tangible property the defendant owned except the stock in the Fitch Company, was deeded in trust to the Bankers Trust Company of this City for the plaintiff, the children and the defendant's benefit, and by the terms of which she receives \$600.00 in cash on the first day of each month throughout the balance of her life, and thereafter the

said \$600.00 per month does, by its provisions, go to the children of plaintiff and defendant. She is now and was receiving this \$600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner. In the settlement of this suit referred to for separate maintenance, the defendant paid to the plaintiff's attorney a large attorney's fee, and in the present suit plaintiff is fully able to pay her own attorneys, and this defendant ought not in equity to be required to pay her attorneys anything.

This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other.

Par. 11. As to paragraph 10 of the plaintiff's petition, the defendant denies the conclusions therein drawn as to the actual value and earnings of the shares of stock. The defendant alleges the fact to be that while the defendant owns and controls 2182 shares of stock in the F. W. Fitch Company, that the same constitutes all of the assets and
76 property that this defendant possesses other than his interest in the trust agreement referred to. The value of this stock depends entirely upon the success or failure of the F. W. Fitch Company. That the hair tonic business does not consist of the manufacture and sale of what is commonly termed a staple product, but is built upon advertising and distribution under proper management and executive ability. That it is a fluctuating business and the profits are uncertain and spasmodic and numerous failures result. That there is only one concern of its kind existing in the world today that was in existence when this defendant started to manufacture. The business is peculiarly subject to state and national legislation, and its success and scope of activity depends alone upon the persons in charge.

Par. 12. That the plaintiff, in asking this Court to award to her all of the stock owned by the defendant in the Fitch Company, is asking for all of the property that this defendant owns, and in asking for \$170,000 besides, she is pursuing the usual course that she has pursued throughout the married life of plaintiff and defendant, that is to say, asking for everything and conceding little.

Par. 13. The defendant denies paragraph 7 in the plaintiff's Amendment to her petition, and alleges the fact to be that the said 1810 shares of stock, the transfer of which was made to the name of Gertrude Westburg, is the property of this defendant and said transfer was not made for the purpose of defrauding anyone, but was made by verbal trust in the presence of witnesses because of the condition of the plaintiff's health, and was made with instructions and verbal agreement in the presence of witnesses that in the event of the defendant's death, Gertrude Westburg should hold the stock in trust for the sole benefit of the children of the plaintiff and defendant.

77 Wherefore, the defendant, having answered, asks that the attachments and garnishments herein issued be dismissed, and that the plaintiff's application for a judgment against the defendant for \$175,000 or any other amount be dismissed, and that her application for attorney fees and for costs be dismissed, and her application for corporate stock or any interest therein be dismissed, and for such other and further relief as may be equitable in the premises.

C. C. PUTNAM,
GUY S. CALKINS,
Attorneys for Defendant.

State of Nevada,
County of Washoe—ss.:

I, Fred W. Fitch, being first duly sworn according to law depose and say that I am the defendant in the above entitled cause; that I have read the above and foregoing Answer, and that the statements therein contained are true as I verily believe.

FRED W. FITCH.

Subscribed and sworn to before me by the said Fred W. Fitch, this 17th day of July, A. D. 1925.

A. R. SHEWALTER,
Notary Public, in and for said
County and State.

78 Separate Answer of Gertrude Westburg.

In the District Court of Iowa, In and for Polk County.

Lettie S. Fitch, Plaintiff,

Divorce No. 2550. vs.

F. W. Fitch and Gertrude Westburg, Defendants.

Comes now the defendant, Gertrude Westburg, and answers the amendment to plaintiff's petition, and shows to the Court:

Par. 1. That the defendant admits that she is a resident of the City of Des Moines as set out in paragraph 2 of plaintiff's petition.

Par. 2. Defendant denies paragraph 3 of plaintiff's petition and alleges the fact to be that at no time has she ever entered into any agreement, conspiracy or understanding with the defendant, Fred W. Fitch to secure the ownership of any shares of stock in the Fitch Company, nor has she ever secured any shares of stock in the Fitch Company by any such agreement or conspiracy, nor has she ever intended or attempted to do anything in any manner designed in any way to interfere with any claimed rights that the plaintiff may have in the defendant, Fred W. Fitch's stock in said corporation.

Par. 3. The defendant Gertrude Westburg disclaims any property interest in any of said 1810 shares of stock as alleged in plaintiff's petition, and never has claimed any property interest therein.

Par. 4. The defendant denies that she has any property interest in said stock whatever, and denies each and all of the allegations made in the amendment to plaintiff's petition so far as they may apply to this defendant.

79. Wherefore the defendant Gertrude Westburg asks that as to her the plaintiff's petition and amendments thereto be dismissed at the plaintiff's costs.

C. C. PUTNAM,
GUY S. CALKINS,
Attorneys for defendant,
Gertrude Westburg.

State of California,
City and County of
San Francisco—ss.

I, Gertrude Westburg, being first duly sworn according to law depose and say that I am one of the defendants in the above entitled cause; that I have read the foregoing Separate Answer; that the statements thereof and the allegations therein contained are true as I verily believe.

GERTRUDE WESTBURG.

Subscribed and sworn to before me this 18th day of July,
A. D. 1925.

VIRGINIA A. BEEDE,
Notary Public.

(Seal)

Amendment to Answer

In the District Court of Iowa, in and for Polk County.

Lettie S. Fitch, Plaintiff,
Divorce No. 2550 vs.
Fred W. Fitch, Defendant.

Comes now Fred W. Fitch, defendant, and amends his answer in the above entitled cause by striking out paragraph 13 thereof and inserting in lieu thereof the following:

Said defendant denies paragraph Seven in the plaintiff's amendment to her petition and alleges the fact to be that the said 1810 shares of stock is and at all times has been the property of this defendant; that a verbal conditional transfer of the same was made in March, 1925 to the name of Gertrude Westburg as agent and bailee of this defendant, not for the purpose of defrauding anyone but subject to the said stock being returned to this defendant upon his demand, and for the reason that he was about to leave Des Moines for Reno, Nevada, that he was in poor health at that time and was apprehensive that he might not return therefrom alive; that said transfer was made subject to the condition that this defendant should not return alive from Nevada within twelve months and was not to be effective if he did so return; that it was only in the event of this defendant's death before his return from Nevada to Des Moines that a trust of said stock was to be created for the benefit of defendant's children; that in fact no trust was executed or created of said stock; that the certificates of said stock were never at anytime out of this defendant's possession or control or ownership.

Defendant further states that thereafter in the month of March 1925, he went to Reno, Nevada, that he remained there several months and returned therefrom to Des Moines about Oct. 1st, 1925.

81 Defendant further states that upon his return from Reno, Nevada, to Des Moines he notified the said Gertrude Westburg of his return and of the fact that the condition upon which the trust of said stock was to be created or executed had not occurred and that he would continue his possession control and ownership of said stock.

Wherefore Defendant pray as in his original answer.

C. C. PUTNAM
GUY S. CALKINS
Attorneys for Defendants.

State of Iowa

Polk County—ss.:

I, Fred W. Fitch, being duly sworn on my oath state that I am the Defendant in the above entitled cause, that I have read the foregoing amendment to answer and know the statements therein contained and the same are true as I verily believe.

FRED W. FITCH

Subscribed and sworn to before me by the said Fred W. Fitch this 15th day of December A. D. 1925.

C. C. PUTNAM

(Seal)

Notary Public.

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Exhibit D

Decree

In the District Court of the State of Iowa in and for Polk County

Lettie S. Fitch

Divorce 2550-5 vs.

Fred W. Fitch and Gertrude Westberg

Now on this 17th day of December, 1925, this matter comes on for hearing before the court, the plaintiff appearing in person and by her attorneys, Clark & Byers and Gregory Brunk, and the defendants having heretofore appeared in this cause and filed their separate answers herein, being represented by their attorneys C. C. Putnam and Guy S. Calkins, and it appearing to the court that the parties, Lettie S. Fitch and Fred W. Fitch, have entered into an agreement of settlement of all of their property matters and alimony without the aid of the court, and that the agreement has been performed and division of the property and provisions for alimony made in accordance therewith; and defendant Fred W. Fitch's answer as amended being now withdrawn in open court, this matter proceeds to final determination upon the allegations of the plaintiff's petition as amended and the evidence and proofs introduced by the plaintiff in support thereof, and the court having heard the evidence, and being fully advised in the premises, finds that the plaintiff is entitled to the relief prayed for in her petition as against Fred W. Fitch, and is entitled to an absolute divorce, and is entitled to the property and alimony settlement.

Paragraph 2.

It Is, Therefore, Ordered, Adjudged and Decreed, that the plaintiff, Lettie S. Fitch, be, and she is hereby, divorced from the defendant, Fred W. Fitch, absolutely; and that she be and is hereby, restored to all the rights, privileges and immunities of a single and unmarried woman; that she be, and is given the permanent care and custody of her minor son, Lucius W. Fitch; that the trust agreement which is referred to in the defendant's answer as having been entered into between these parties on or about the 23rd day of April 1923, the same being recorded in Book 870 on Page 502 of the records of the Recorder of Deeds of Polk County, Iowa, be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court.

Paragraph 3.

It Is Further Ordered, Adjudged and Decreed, that plaintiff herein shall pay her own attorney's fees and the costs of this action.

Paragraph 4.

It Is Further Ordered, Adjudged and Decreed, that all attachments and garnishments heretofore issued and levied in this cause at the instance of the plaintiff be, and they are hereby, discharged and released, and the Sheriff of Polk County, be, and he is hereby, ordered and directed to discharge the same and to notify the Bankers Trust Company and the F. W. Fitch Company, both of Des Moines, Iowa, garnishees thereof, and to cancel his notations on the stock books of the F. W. Fitch Company and the Bankers Trust Company, and to release said attachments and garnishments thereon.

Paragraph 5.

It Is Further Ordered, that the petition of the plaintiff against the defendant Gertrude Westberg be, and it is hereby, dismissed on its merits at plaintiff's costs.

JOHN FLETCHER, Judge.

Clerk's Certificate

State of Iowa,

Polk County—ss.:

I, Fred Barkalow, Clerk of the District Court, within and for the County and State aforesaid, do hereby certify the

Divorce in the case of Lettie S. Fitch vs. Fred W. Fitch and Gertrude Westberg, same being Divorce No. 2550 in Docket 5, and recorded in Journal 1 on page 88—as full, true, correct and complete, as the same remains of record in my office.

(Seal)
U. S. Dist. Court
Polk County, Ia.

In Testimony Whereof, I have hereunto
set my hand and affixed the seal of
said District Court this 18th day
of March 1937.

FRED BARKALOW,
Clerk of said Court

By Albert J. Scalise
Deputy.

85 (Praecipe for Transcript.)

Filed July 11, 1938, United States Board of Tax
Appeals.

United States Board of Tax Appeals

F. W. Fitch, Petitioner

Docket No. 84748 vs.

Commissioner of Internal Revenue, Respondent

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Eighth Circuit, heretofore filed by the above-named petitioner:

1. Docket entries of the proceedings before the Board.
2. Petition filed on May 26, 1936.
3. Answer to petition filed on July 16, 1936.
4. Findings of fact and opinion of the Board, promulgated on January 12, 1938.
5. Order of redetermination, entered on March 10, 1938.
6. Petition for review filed on May 24, 1938.
- 86 7. Notice of filing petition for review, filed on May 24, 1938.

8. Stipulation of facts filed upon submission of case at Des Moines, Iowa, May 5, 1937.

9. Exhibits A, B, C and D referred to in, and filed with and as a part of the Stipulation of Facts.

10. Orders enlarging time for transmission and delivery of documents not included in record.

11. This Praeceptum for Record.

12. Notice of filing this Praeceptum for Record and the admission of service thereof.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

A. F. SCHAETZLE

Attorney for Petitioner.

Service of a copy of this praecipe is hereby admitted this 13th day of July, 1938.

J. P. WENCHEL

Chief Counsel,

Bureau of Internal Revenue,
Attorney for Respondent.

Agreement to Praeceptum

It is hereby stipulated by and between the parties through their respective counsel that the foregoing praecipe for transcript constitutes a request for the entire record, required on appeal of this case to the Circuit Court of Appeals for the Eighth Circuit and the same is hereby approved by the undersigned attorney for the petition on review and by the undersigned J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue, respondent on review.

Dated: 7/7/38.

A. F. SCHAETZLE

Attorney for Petitioner on Review.

J. P. WENCHEL

Chief Counsel for Bureau of Internal Revenue.

88 (Notice of filing of Praecept for Transcript.)

Filed July 14, 1938, U. S. Board of Tax Appeals.

To:

J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

Please Take Notice that on the 9th day of July, 1938, the undersigned, attorney for F. W. Fitch, the petitioner in the above-entitled proceeding, has filed with the Clerk of the United States Board of Tax Appeals a Praecept for Record, a copy of which is annexed hereto.

A. F. SCHAETZLE

Attorney for Petitioner

Dated: July 13, 1938.

Receipt of the foregoing notice of filing the Praecept for Record and service of a copy of the praecipe herein mentioned is acknowledged this 13th day of July, 1938.

J. P. WENCHEL

Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

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(Clerk's Certificate to Transcript.)

United States Board of Tax Appeals

Washington

F. W. Fitch, Petitioner,

Docket No. 84748 vs.

Commissioner of Internal Revenue, Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 88, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office

as called for by the Praecept in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 26th day of July, 1938.

(Seal)
Board of Tax
Appeals, 1924.

B. D. GAMBLE
Clerk, United States Board
of Tax Appeals.

Filed Sep 8 1938 E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

**UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT**

No. 11306

F. W. FITCH, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

Order of submission

March Term, 1939

Wednesday, March 15, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. A. F. Schaetzle for petitioner, continued by Miss Louise Foster, Special Assistant to Attorney General, for respondent, and concluded by Mr. A. F. Schaetzle for petitioner. Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 11,306.—March Term, A. D. 1939

F. W. FITCH, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review Decision of the United States Board of Tax Appeals

[April 25, 1939]

Mr. A. F. Schaetzle for Petitioner.

Miss Louise Foster, Special Assistant to the Attorney General
Mr. James W. Morris, Assistant Attorney General, and Mr. Sewall
My, Special Assistant to the Attorney General, were with her on the
(ef) for Respondent.

By leave of Court, Mr. William D. Mitchell, Mr. Harold B. Tanner and Mr. Rollin Browne filed a brief as amici curiae.

Before GARDNER and WOODROUGH, Circuit Judges, and OTIS, District Judge.

GARDNER, Circuit Judge, delivered the opinion of the court.

This case is before us on petition for review of a decision of the United States Board of Tax Appeals determining a deficiency in income taxes against the petitioner for the year 1933, in the sum of \$1,555.58. The facts were stipulated, and hence, are not in dispute.

Petitioner, a resident of Des Moines, Iowa, is the divorced husband of Lettie S. Fitch, to whom he was married in 1892. They lived together as husband and wife until 1917, at which time they separated. On December 27, 1922, Lettie S. Fitch filed a suit for separate maintenance against petitioner. This suit was dismissed on April 7, 1923, after the parties had agreed upon a settlement. In accordance with the settlement, petitioner leased certain premises owned by him to the F. W. Fitch Company for ninety-nine years, at an annual rental of \$12,000.00, and on April 23, 1923, joined his wife and the Bankers Trust Company as trustee, in the execution of a trust agreement, under which the trustee took title to the premises and an assignment of the lease to collect the rents and, after deduction of expenses, to pay to Lettie S. Fitch \$600.00 a month during her life, and the balance of the annual income to the petitioner during his life. Provision was made further for the duration of the trust during the lifetime of both petitioner and Lettie S. Fitch and in any case for at least fifteen years, and for distribution of the income to the children of petitioner and his wife in case either should die prior to the termination of the minimum period. Petitioner irrevocably alienated the corpus, as well as any right to receive \$600.00 per month provided for Lettie S. Fitch in favor of her and the children. Provision was made that upon the termination of the trust period, the corpus should be paid over to the children or their lineal descendants.

On April 14, 1925, Lettie S. Fitch filed a suit for divorce against petitioner in the District Court of Polk County, Iowa, alleging cruelty, desertion, and failure to provide for her and a minor child in a proper manner. In his answer, petitioner alleged inter alia, that he had created the above-described trust for her benefit in settlement of the prior suit for maintenance and that "She is now and was receiving this \$600.00 per month at the time she filed her petition herein, claiming that the defendant had failed to provide for her and for the minor child in a proper manner." and that "This constituted and now constitutes a full and complete settlement and gives to the plaintiff an amount in excess of what she is in equity entitled to, and the plaintiff, at the time orally agreed with the defendant that the amount given her was sufficient for all time, and that plaintiff and defendant should go their respective ways without interference with each other." On December 17, 1925, the court entered a decree, granting the wife an absolute divorce and

the custody of the minor son, and further adjudging, "That the trust agreement which is referred to in the defendant's answer * * * be, and the same is hereby ratified and confirmed by the court; and that the property and alimony settlement made by the parties be, and it is hereby confirmed by the court."

Pursuant to this decree, petitioner transferred to Lettie S. Fitch 600 common shares of the F. W. Fitch Company, which, on December 31, 1925, had a book value of \$77,959.80, and paid to her attorney the sum of \$23,500.00, of which she received \$8,500.00, the balance representing counsel fees and expenses.

During 1933, the trustee under the trust above described, distributed to Lettie S. Fitch \$7,128.00, which the commissioner included in petitioner's taxable income. As forecast, the board upheld the commissioner, and the case is here on petition to review. It is the contention of petitioner: (1) that the trust agreement resulted in the conveyance of an irrevocable life interest to his former wife in discharge of his marital obligation; (2) that this in effect constituted a lump sum settlement made in connection with divorce proceedings; (3) that by reason of the execution of this trust agreement and its adoption and confirmation by the court, the petitioner was under no legal obligation or liability for the support of his divorced wife during the tax year in question, and hence, the income received by his wife was not taxable to him.

Whether or not petitioner was under any legal liability for the support of his wife during the tax year depends upon the construction to be given the contract and the effect of the decree under the laws of the State of Iowa. The jurisdiction of the Iowa court in the divorce proceeding is not questioned. The provisions of the code of Iowa relative to alimony are as follows:

"Section 10480—Showing—In making such orders (i. e., reference to maintenance during litigation and attachment) the court or judge shall take into consideration the age and sex of the plaintiff, the physical and pecuniary condition of the parties, and such other matters as are pertinent which may be shown by affidavits, in addition to the pleadings, or otherwise, as the court or judge may direct."

"Section 10481—Alimony—Custody of Children—Changes. When a divorce is decreed, the court may make such orders in relation of the children, property, parties, and the maintenance of the parties, as shall be right."

In the instant case, the parties settled their property rights out of court and this settlement was confirmed in the court's decree. Under this settlement there were transferred to Lettie S. Fitch 600 shares of the common stock of the F. W. Fitch Company, having a book value of \$77,959.80, and there was paid to her attorney the sum of \$23,500.00. In addition to this, she was given a life interest in the trust property to the extent of \$600.00 per month, less administration expenses. She had previously received from her husband a home which he purchased for her in 1919, furnishings for said home, and

an automobile. At the time of the granting of the absolute divorce she, therefore, had this separate property, and under these circumstances a lump sum settlement was made by which she acquired the above described stock and cash to the amount of \$23,500.00. When, therefore, the decree of absolute divorce was entered, the obligation for further support was discharged. *Kraft v. Kraft* (Ia.) 187 N. W. 449; *Spain v. Spain* (Ia.) 158 N. W. 529; *Barish v. Barish* (Ia.) 180 N. W. 724; *Carr v. Carr* (Ia.) 171 N. W. 785; *McCoy v. McCoy* (Ia.) 183 N. W. 377.

In *Kraft v. Kraft*, supra, the court, among other things, said:

"The effect of the decree was, we think, so far as defendant is concerned, to award her a lump sum out of her husband's estate. We held in *Spain v. Spain*, 177 Iowa, 249, 158 N. W. 529, L. R. A. 1917D, 319, Ann. Cas. 1918E, 1225, that the court has no inherent power to modify a decree of divorce as regards alimony, nor power to so modify, except for such fraud or mistake as would justify a modification or change of any judgment and that a decree of divorce silent as to any alimony cannot thereafter be so modified as to provide for alimony, even though there is a showing of change in financial condition."

In *McCoy v. McCoy*, supra, in an opinion by Chief Justice Evans, it was said:

"The general ground upon which these holdings are based was that alimony is an incident of the marriage relation; that it can only be allowed where the marriage relation exists; that it may be allowed as a part of the decree of divorce; that the severance of the marriage relation by absolute decree without alimony terminates the right to alimony."

We think the right to further alimony was absolutely precluded by the decree of divorce which dissolved the marriage status, and hence, removed the duty or obligation of the petitioner further to support his former wife.

The general rules for the taxation of trust income are to be found in Sections 161, 162, 166, and 167 of the Revenue Act of 1932. Under these provisions the trust is treated as a taxable entity. The trustee is subjected to tax on the net income computed on the same basis as in the case of an individual, except that a deduction is allowed for all income distributed or distributable to the beneficiaries, who are required to include the amount so distributed to them in computing their own income. We are of the view that Lettie S. Fitch is a true trust income beneficiary and as such liable to the income tax thereon. *Irwin v. Gavit*, 268 U. S. 161; *Blair v. Commissioner*, 300 U. S. 5.

In the instant case, it is contended that under the doctrine of *Douglas v. Willcuts*, 296 U. S. 1, the income from this trust going to petitioner's divorced wife was taxable to him, but we think the case is readily distinguishable. It was held in that case that there was a continuing obligation of the trust grantor to the beneficiary of the

trust and that the income of the trust was merely used to satisfy that obligation. There is, of course, no doubt as to the soundness of this principle. Otherwise, a debtor could evade income taxes by the simple device of creating trusts with directions to apply the income to the payment of his obligations. But here, as we have seen, there was no continuing obligation to petitioner's divorced wife, and neither by the decree nor the statutory provisions of Iowa, was there any legal liability for support. Confessedly, there was such an obligation up to the time of entry of decree, but this was extinguished when the absolute decree of divorce was entered. It is to be observed that under the trust agreement the annual distribution made to petitioner's divorced wife was the trust income and nothing but trust income. In other words, she was not entitled to a fixed amount per annum, payable out of trust income, with deficiencies to be made up out of the corpus or otherwise. In the Douglas case, the legal liability to his wife continued throughout the tax year because he expressly agreed that if the trust income should fall below \$15,000.00 in any year, he would make up the deficiency, and the divorce decree confirmed that liability. In addition to this, the law of Minnesota continued his liability for the support of his divorced wife and vested a continuing jurisdiction in the courts to supervise and revise both the decree and the trust agreement to that end. So, too, in *Helvering v. Lucy Blumenthal*, 296 U. S. 552, relied upon by the commissioner, the grantor remained personally liable for the bank loan, to the satisfaction of which the trust income was directed to be devoted. In *Helvering v. Schweitzer*, 296 U. S. 551, and *Helvering v. Stokes*, 296 U. S. 551, there was a continuing liability in the grantors not superseded by the trusts involved. In *Commissioner v. Hyde*, 82 Fed. (2d) 174, and *Glendinning v. Commissioner*, 97 Fed. (2d) 51, the grantors were held liable by reason of their express agreements to make up deficiencies in the trust income. In *Helvering v. Coxe*, 297 U. S. 694, a divorce had been granted under the laws of New Jersey, and under those laws the husband was obligated to support his wife even after divorce. N. J. Rev. Statutes, Sec. 2:50-37; *McKensy v. McKensy*, 65 N. J. Eq. 633, 55 Atl. 1073; *Greenberg v. Greenberg*, 99 N. J. Eq. 461, 133 Atl. 768. The conflict in the decisions is apparent, rather than real.

The case of *Helvering v. Brooks* (C. C. A. 2), 82 Fed. (2d) 173, is strongly relied upon as sustaining the decision of the Board of Tax Appeals in the instant case, but the Brooks case arose in the State of Florida, and under the law of that state the husband remained liable for the support of his divorced wife, and the court retained jurisdiction over the matter, with the power at any time by supplemental decree to alter the provisions of the trust agreement with respect to the wife's support. So, too, in *Alsop v. Commissioner* (C. C. A. 3), 92 Fed. (2d) 148, the grantor remained liable to his divorced wife during the tax year, by reason of an express agreement to make up deficiencies in the trust income so as to as-

sure her receiving a fixed amount each year. In the instant case, however, there was absolutely no continuing obligation on the part of the petitioner for the support and maintenance of his divorced wife.

The facts in *Commissioner v. Tuttle* (C. C. A. 6), 89 Fed. (2d) 112, are analogous to those in the instant case. It was there insisted that under the doctrine of *Douglas v. Willcuts*, the husband was liable to income tax arising from a trust for his divorced wife pursuant to settlement agreement made in contemplation of divorce. In the course of that opinion it is, among other things, said:

"Careful consideration of *Douglas v. Willcuts* leads to the conclusion that decision was based on the fact that the income of the trust estate was alimony under the provisions of the Minnesota statute and the terms of the decree. By the statutes of Minnesota the court is empowered upon divorce to decree part of the husband's estate to the wife, and also such alimony as it may deem just and reasonable.

* * * It may from time to time revise and alter the decree with respect to the alimony or allowance, and also with respect to the appropriation and payment of principal and interest of property held in trust, and in exercising this authority it is not precluded by stipulations and agreements of the parties."

The court proceeds to say that—

"Under the Michigan law, however, parties to a divorce action may enter into a property settlement by which, in the absence of fraud, duress, or mutual mistake they will be bound. * * *

"It was competent for the parties to enter into the terms of a settlement agreement in contemplation of divorce. Such agreement is recognized as final and conclusive between the parties in the absence of fraud, duress, or mistake, and its efficacy as well as its finality springs not from the order of the court but from the consent of the contracting parties. It may not thereafter be amended or revised by the court. * * *

"It cannot be doubted that in making a settlement with his wife in contemplation of divorce under Michigan law the respondent might have paid her a lump sum in money, or deeded to her certain property. The rentals from such property, or the return on the money if invested, would be her income and not his. Or he might have settled upon her a life estate in property. Its income would not thereafter be his income. If he had bought for her an annuity, its avails would likewise be her income. We are unable to distinguish from these examples an irrevocable assignment for life without limitation or restraint of the total income of specified securities.

"Another important distinction between the present case and *Douglas v. Willcuts*, supra, is this: The settlement there provided for a specified payment in money through the trustee to the wife. Payment was secured by the transfer of securities in trust. The transfer was but for security, however, since deficiencies were to be made up by the settlor and excess income was to be paid to him. Finality

was not achieved by the agreement. Here the transfer, so far as it operates, is absolute. There is no guaranty of return, no obligation to make up deficiency, no reservation of excess income, no right retained to change or substitute securities. The wife definitely and finally accepted the income from a certain amount of property, whatever it might prove to be, in settlement of her claims to dower and other rights. There remained no continuing obligation on the part of the respondent for support and maintenance, no debt to be paid out of his income, either actually or constructively. Upon the creation of the trust the trustor's obligations to his wife under both the contract and the decree were fully and finally liquidated."

We are in accord with these views as applied to the facts and issues in this case. The decision of the Board of Tax Appeals is therefore reversed and the cause is remanded for further proceedings consistent herewith.

WOODROUGH, Circuit Judge.

I dissent because it seems to me that *Douglas v. Willcuts*, 296 U. S., page 1, requires us to affirm.

Decree

United States Circuit Court of Appeals, Eighth Circuit

No. 11306

March Term, 1939

Saturday, April 29, 1939

F. W. FETCH, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE

On Petition to Review Decision of United States Board of Tax Appeals

This cause came on to be heard on the petition for review of a decision of the United States Board of Tax Appeals determining the deficiency in income taxes against the petitioner for the year 1933, in the sum of One Thousand Five Hundred Fifty-five and 58/100 (\$1,555.58) Dollars, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals be, and the same is hereby, reversed without the taxation of costs in favor of either of the parties in this Court.

And it is further ordered by this Court that this cause be and the same is hereby remanded to the said Board of Tax Appeals for further proceedings consistent with the opinion of this Court filed herein April 25, 1939.

APRIL 29, 1939.

Clerk's certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true, and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein F. W. Fitch was Petitioner and the Commissioner of Internal Revenue was Respondent, No. 11306, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the seventeenth day of May, A. D. 1939, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the United States Board of Tax Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-first day of July, A. D. 1939.

[SEAL]

E. E. KOCH,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1939.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

MICRO CARD

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